S. HRG. 100-480

GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 473

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR UNIFORM STANDARDS OF LIABILITY FOR HARM ARISING OUT OF GENERAL AVIATION ACCIDENTS

DECEMBER 3, 1987

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
81-193 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S261-27

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GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1987

THURSDAY, DECEMBER 3, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON AVIATION,
Washington, DC

The subcommittee met, pursuant to notice, at 9:52 a.m. in room SR-253, Russell Senate Office Building, Hon. Wendell H. Ford [chairman of the subcommittee] presiding.

Staff members assigned to this hearing: Steve Palmer, professional staff member; Linda Lance, staff counsel; and Patty Hahn, minority staff counsel.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Good morning, ladies and gentlemen. We are a full committee now.

This hearing is slightly different from the majority of those we have held this year, where we have focused on safety, capacity, and the quality of commercial air service. Today the Aviation Subcommittee undertakes an examination of the health of the general aviation industry, with particular attention focused on the need for Federal legislation to establish standards for liability arising out of general aviation aircraft accidents.

Senator Kassebaum, my friend and ranking member on this subcommittee, has introduced such legislation. S. 473, the General Aviation Accident Liability Standards Act of 1987, of which I am a cosponsor, is designed to ease the devastating burden of liability insurance costs on the general aviation industry, something which I believe is needed to ensure its long-term viability.

In 1979, U.S. manufacturers delivered approximately 17,000 general aviation aircraft. Largely due to the increasing costs of liability settlements and insurance, the number of aircraft delivered dropped to approximately 1500 in 1986.

Clearly, something must be done to save our manufacturing capacity before it disappears and we are reliant upon foreign products. And just as importantly, we need to ensure that flying remains affordable for the public, especially in light of a diminishing number of potential commercial pilots and their reduced experience levels.

I look forward to hearing from our distinguished witnesses today. We are fortunate to have a panel of manufacturers, representatives from the two largest general aviation user groups, and an aviation attorney, along with some distinguished elected officials, who will express their concerns and interest in this piece of legislation.

And I appreciate very much them taking their time to appear today.

Senator Kassebaum, do you have any statement you would like to make this morning?

OPENING STATEMENT BY SENATOR KASSEBAUM

Senator KASSEBAUM. Thank you, Mr. Chairman.

Thank you for calling this hearing in a timely fashion. Product liability in its full scope has been a concern of the Congress for many years. It is an issue that touches all businesses and consumers. It has been very discouraging that we have not made more progress on this very important issue than we have, and certainly the aviation industry has been one that has been particularly touched by our inability to address it in a major way.

Last year the Commerce Committee did pass legislation, as a matter of fact the same bill that I introduced this year S. 473. The bill incorporates the amendments added in the Committee last year and I think it is an important piece of legislation. I have every confidence that the Commerce Committee will again report this bill out.

I would hope that we could also then achieve some action on the Senate floor.

You have stated well, Mr. Chairman, and it will be stated in the hearing, the consequences of our not taking action on aviation product liability legislation. It is significant to our aviation manufacturers and to the flying public, and I believe to the overall health of aviation in this country.

So it is my hope that we can make the point in such a way that our colleagues in both the House and Senate will understand the extreme importance of addressing aviation product liability in particular, if we cannot indeed address the whole issue of product liability in its full scope.

Mr. Chairman—I am pleased we are holding this hearing on the General Aviation Accident Liability Standards Act—legislation I introduced at the beginning of the 100th Congress. I introduced similar legislation in the 99th Congress. After careful scrutiny and several modifications of the first draft, the Commerce Committee reported S. 2794 without objection. The legislation we are considering today contains provisions identical to those in S. 2794.

Product liability has been an important issue in Congress for many years. There are few businesses and consumers not touched by the problem. Numerous efforts have been undertaken over the past decade to achieve comprehensive product liability tort reform.

Although I have supported these comprehensive measures in the past and will continue to do so, I have been discouraged by the lack of progress to date in dealing effectively with the problem. The failure to act has had particularly harsh consequences for the aviation industry. Because of this lack of progress in addressing general tort reform I introduced legislation dealing specifically with the general aviation industry—the bill we are considering in this hearing.

The heart of the bill is the creation of federal liability standards, including the retention of strict liability. The bill retains completely joint and several liability between the manufacturers of all subsystems and component parts and enacts comparative responsibility among other parties. It also establishes a 20-year statute of repose for aircraft and replacement parts—which begins anew each time a part is replaced.

I also want to make it clear what this bill does NOT do. It does not cap damages in any way. It does not cap or limit attorneys fees. It does not waive the responsibility to supply warnings against dangers regardless of the age of the product. Nor does it limit a person's right to sue.

In 1979, over 17,000 general aviation aircraft were sold in the United States. In 1986 there were 1,495 units sold which is a 26 percent decrease from 1985. The year 1987 promises to be even worse. Product liability costs (judgments, settlements, and out of pocket defense costs) incurred by the industry have skyrocketed from $24 million in 1977 to $209 million in 1985, despite the fact that general aviation accident rates have continued to decline. Unemployment in the domestic industry has risen to a staggering 65 percent. Such massive unemployment not only strips workers of a means of livelihood, it takes away the skills and dedicated work force necessary if we are to ever rebuild this industry.

Technology and innovation are being stifled because of prohibitive product liability costs. Airframe manufacturers are finding it increasingly difficult to find component manufacturers, as many businesses are totally giving up their aviation product lines as too costly to maintain. All of this adds up to even more American jobs lost. The increasing export of our industry is a tragedy.

The product liability problem facing the U.S. general aviation industry is much more than a domestic problem. The harm it causes is reflected in general aviation trade figures. Prior to 1981, U.S. general aviation exports contributed an annual multi-million dollar surplus to our nation's balance of trade. In 1981, and every year since, the U.S. general aviation industry has suffered significant trade deficits—contributing to the national trade deficit which has become a matter of grave concern.

Foreign manufacturers stand to be big winners if this product liability problem is not resolved. Their tort liability pales in comparison with that of the large U.S. manufacturers. This is in large part due to the fact that they do not have the enormous numbers of aircraft in service in the United States, each of which remains a liability of the manufacturer, regardless of age. There is a significantly smaller percentage of foreign aircraft in service in the United States subject to our domestic tort laws. That results in considerably lower liability risk and a considerable competitive advantage for foreign manufacturers.

This same lack of competitive pricing is taking its toll on the U.S. market as well. Cessna Aircraft, the world's largest general aviation manufacturer, has suspended production of all piston engine aircraft through the 1987 model year. Piper Aircraft has stated it may be forced to manufacture only one piston engine aircraft, and Beech Aircraft has cut back its production significantly. No training airplanes are being made in the United States. As foreign manufacturers move in to fill this near vacuum in domestic airplane supplies, the U.S. industry's negative trade balance will likely increase.

The erosion of U.S. general aviation competitiveness is in great part the result of the devastating effects of our current product liability environment; its future is largely dependent on the resolution of the problem. The federal government regulates the industry from design to production; it regulates the training and licensing of pilots and mechanics; the air traffic control system is federally operated and regulated. The federal interest and presence in aviation is all pervasive except in one area—litigation is conducted under individual and widely varying state laws. Federal product liability standards, a cornerstone of this legislation, would provide uniformity and predictability.

The other provisions of the legislation are fair and balanced to both plaintiff and defendant. Those provisions have three underlying objectives: compensation for innocent victims that is timely and fair, treatment of product manufacturers that is reasonable and just, and insurance that is available and affordable.

Virtually all of the national general aviation consumer groups support S.473. This support for product liability reform by both manufacturers and users is unique. Today's hearing will provide additional evidence of a crisis facing the general aviation industry in this country. I believe we have the ability and the opportunity to moderate this crisis, if we have the courage to press ahead for reform of our liability system.

Thank you, Mr. Chairman.

Senator Ford. Thank you, Senator.

Senator Exon.

OPENING STATEMENT BY SENATOR EXON

Senator Exon. Mr. Chairman, thank you very much. I want to congratulate you for calling this hearing. I appreciate the fact that Senator Kassebaum has introduced this bill once again. I was a cosponsor of it last year. I am a cosponsor of it again this year.

I hope we can move this ahead very aggressively and get it passed in the 2nd session of the 100th Congress. I think it is indicative that we are finally getting around to doing something for general aviation, which oftentimes is the forgotten child or stepchild of aviation in general.

And I simply say that general aviation is a tremendously important part of our overall aviation industry in the United States of America. We have given too little concern to it over the years. I believe that S. 473 is a terribly important step in the right direction, and I strongly support it.

I have to go to the floor for another matter. I will be back in short order to listen to the testimony today.

Thank you very much, Mr. Chairman.

Senator FORD. Thank you, Senator Exon.

[The bill follows:]

100TH CONGRESS
1ST SESSION

S. 473

To regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 1987

Mrs. KASSEBAUM (for herself, Mr. DOLE, Mr. DANFORTH, Mr. INOUYE, Mr. EXON, Mr. FORD, Mr. KASTEN, Mr. WALLOP, Mr. PRESSLER, Mr. SPECTER, Mr. RUDMAN, Mr. GARN, Mr. HEINZ, Mr. PELL, Mr. ZORINSKY, Mr. MURKOWSKI, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "General Aviation Accident Liability Standards Act of 1987".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) transportation by air of passengers continues to comprise an increasingly important component of the Nation's overall transportation system;

(2) although the incidence of injuries to passengers in general aviation accidents has decreased, the number of general aviation accident liability claims against general aviation aircraft manufacturers and the amount of damages sought in such claims is increasing at disproportionate rates, beyond any relationship to the quality of the aircraft manufactured and in use;

(3) the current system for determining liability and damages for compensating individuals injured in general aviation accidents is inadequate;

(4) competent general aviation manufacturers and component part manufacturers are ceasing or limiting production of general aviation aircraft or some models of such aircraft because of the increasing costs and unavailability of product liability insurance;

(5) the increase in the number of liability claims and the size of awards and settlements, and the excessive time and expense devoted to the resolution of such claims, impose a substantial economic burden on general aviation manufacturers and their dealers;

(6) the Federal Government has an interest in the general aviation accident liability system because the

Federal Government has established a comprehensive system for regulating general aviation, including—

(A) establishing standards for design, construction, and certification of general aviation aircraft,

(B) establishing standards for maintenance of aircraft, licensing of repair facilities, and licensing of persons who may perform or approve maintenance, repairs, and inspections,

(C) establishing standards for training and licensing of pilots,

(D) establishing a comprehensive air control system,

(E) conducting investigations to determine the probable cause of aviation accidents and prevent future accidents, and

(F) conducting other activities necessary to assure a safe air transportation system;

and this Federal system is the exclusive legal authority for regulating aviation operations and safety;

(7) it is in the national interest to reduce unnecessary expenditures related to general aviation accident liability claims while providing more rapid and more efficient compensation for individuals harmed in general aviation accidents; and

(8) Federal action to reform the general aviation accident liability system will result in—

(A) the maintenance of airworthy general aviation aircraft; and

(B) a more rational general aviation accident liability system.

(b) It is the purpose of this Act to establish standards for determining liability for harm arising out of general aviation accidents.

DEFINITIONS

Sec. 3. As used in this Act, the term—

(1) "Administrator" means the Administrator of the Federal Aviation Administration;

(2) "claimant" means any person who brings a general aviation accident liability action subject to this Act, and any person on whose behalf such an action is brought, including—

(A) the claimant's decedent; and

(B) the claimant's parent or guardian, if the action is brought through or on behalf of a minor or incompetent;

(3) "general aviation accident" means any accident which arises out of the operation of any general aviation aircraft and which results in harm;

(4) "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certifi-

cate has been issued by the Administrator under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.) which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than twenty passengers, and which is not, at the time of the accident, engaged in scheduled passenger carrying operations as defined in regulations issued under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.);

(5) "general aviation manufacturer" means—

(A) the builder or manufacturer of the airframe of a general aviation aircraft;

(B) the manufacturer of the engine of a general aviation aircraft; and

(C) the manufacturer of any system, component, subassembly, or other part of a general aviation aircraft;

(6) "harm" means—

(A) property damage or bodily injury sustained by a person;

(B) death resulting from such bodily injury;

(C) pain and suffering which is caused by such bodily injury; and

(D) emotional harm (including bereavement and loss of affection, care, or society) which is caused by such bodily injury;

(7) "product" means a general aviation aircraft and any system, component, subassembly, or other part of a general aviation aircraft; and

(8) "property damage" means physical injury to tangible property, including loss of use of tangible property.

PREEMPTION: APPLICABILITY

SEC. 4. (a) This Act supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this Act establishes a rule of law or procedure applicable to the claim.

(b) Nothing in this Act shall be construed to supersede or to waive or affect any defense of sovereign immunity asserted by the United States or any State.

(c) Nothing in this Act shall be construed to affect the liability of a manufacturer, owner, or operator of any aircraft that is not a general aviation aircraft, or a person who repairs, maintains, or provides any other support for any aircraft that is not a general aviation aircraft, for damages for harm arising out of the operation of an aircraft that is not a general aviation aircraft.

(d) No right of action for harm exists under this Act if that right would be inconsistent with the provisions of any applicable workers' compensation law.

(e) The provisions of this Act shall apply only to—

(1) any manufacturer, owner, or operator of any general aviation aircraft, and any person who repairs, maintains, or provides any other support for such an aircraft;

(2) any occupant of a general aviation aircraft at the time of a general aviation accident, and any person who brings an action for harm caused by such accident on behalf of such occupant; and

(3) any nonoccupant of a general aviation aircraft at the time of a general aviation accident, only if such nonoccupant is bringing an action for harm caused by such accident which arises out of the harm to an occupant of such aircraft at the time of such accident.

UNIFORM STANDARDS OF LIABILITY FOR GENERAL AVIATION ACCIDENTS

SEC. 5. (a) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a party and may recover damages from such party, if such party was negligent and such negligence is a proximate cause of the claimant's harm.

(b)(1) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) the product, when it left the control of the manufacturer, was in a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible;

(B) the defective condition is a proximate cause of the claimant's harm; and

(C) the general aviation aircraft was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured.

(2) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) at the time the product left the control of the manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about a danger connected with the product that caused the claimant's harm; and

(ii) failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, unless such warnings or instructions, if provided, would not have materially affected the conduct of the user of the product; or

(B) after the product left the control of the general aviation manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about the danger which caused the claimant's harm; and

(ii) failed to take reasonable steps to provide warnings or instructions, after the manufacture of the product, which would have been provided by a person exercising reasonable care, unless such warnings or instructions, if provided, would not have materially affected the conduct of the product user;

and the failure to provide warnings or instructions described in subparagraph (A) or (B) of this paragraph is a proximate cause of the claimant's harm.

(3) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) the manufacturer made an express warranty with respect to the product;

(B) such warranty relates to that aspect of the product which caused the harm;

(C) the product failed to conform to such warranty; and

(D) the failure of the product to conform to such warranty is a proximate cause of the claimant's harm.

(c)(1) In an action governed by subsection (b) of this section, a general aviation manufacturer shall not be liable if such manufacturer proves, by a preponderance of the evidence, that—

(A) the defective condition could have been corrected by compliance with action described in an airworthiness directive issued by the Administrator or a service bulletin issued by the manufacturer of the product; and

(B) such directive or service bulletin was issued at a reasonable time before the date of the accident and after the product left the control of the general aviation manufacturer.

(2) In any action governed by subsection (b) of this section, evidence of compliance with standards, conditions or specifications established, adopted or approved by the Federal Aviation Administration shall be admissible with regard to whether the product was defective and unreasonably dangerous for its intended purpose.

COMPARATIVE RESPONSIBILITY

SEC. 6. (a) All actions for harm arising out of a general aviation accident shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant's conduct shall not bar recovery in an action under this Act, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. The trier of fact shall determine comparative responsibility by making findings indicating the percentage of total responsibility for the claimant's harm attributable to the claimant, each defendant, each third-party defendant, and any other person not a party to the action.

(b) Except as provided in subsection (c) of this section, a defendant is severally but not jointly liable in any action for harm arising out of a general aviation accident, and the liability of any defendant in any such action shall be determined on the basis of such defendant's proportionate share of responsibility for the claimant's harm.

(c) In any action for harm arising out of a general aviation accident—

(1) a general aviation manufacturer who is the builder or manufacturer of the airframe of the general aviation aircraft involved is jointly and severally liable for harm caused by a defective system, component, subassembly, or other part of such aircraft that the

manufacturer installed or certified as part of the original type design for such aircraft; and

(2) a general aviation manufacturer who is the manufacturer of a system or component of the general aviation aircraft involved is jointly and severally liable for damages caused by a defective subassembly or other part of such system or component.

(d) A general aviation manufacturer and any other person jointly liable under subsection (c) of this section shall have the right to bring an action for indemnity or contribution against any person with whom they are jointly liable under subsection (c) of this section.

TIME LIMITATION ON LIABILITY

SEC. 7. (a) Except as provided in subsection (b) of this section, no civil action for harm arising out of a general aviation accident which is brought against a general aviation manufacturer may be brought for harm which is alleged to have been caused by an aircraft or a system, component, subassembly, or other part of an aircraft and which occurs more than—

(1) twenty years from—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such an aircraft; or

(2) with respect to any system, component, subassembly, or other part which replaced another product in, or which was added to, the aircraft, and which is alleged to have caused the claimant's harm, twenty years from the date of the replacement or addition.

(b) Subsection (a) of this section does not apply in the case of harm to a claimant which occurs after the period set forth in subsection (a) of this section if the general aviation manufacturer or the seller of the product that caused the claimant's harm gave an express warranty that the product would be suitable, for the purpose for which it was intended, for a longer period of time.

(c) Nothing in this section shall be construed to affect a person's duty to provide, after the sale or lease of an aircraft, to aircraft owners, and to repair facilities to which a license or certificate to perform repairs has been issued by the Administrator, additional or modified warnings or instructions regarding the use or maintenance of such aircraft or any system, component, or other part of such aircraft.

SUBSEQUENT REMEDIAL MEASURES

SEC. 8. In any general aviation accident liability action governed by this Act, evidence of any measure taken after an event which, if taken previously, would have made the event less likely to occur is not admissible to provide liability. Such evidence is admissible to the extent permitted under rule 407 of the Federal Rules of Evidence.

ADMISSIBILITY OF CERTAIN EVIDENCE

SEC. 9. In an action governed by this Act, evidence of Federal, State, or local income tax liability or any Social Security or other payroll tax liability attributable to past or future earnings, support, or profits and the present value of future earnings, support, or profits alleged to have been lost or diminished because of harm arising out of a general aviation accident is admissible regarding proof of the claimant's harm.

PUNITIVE DAMAGES

SEC. 10. (a) Punitive damages may be awarded in an action under this Act for harm arising out of a general aviation accident only if the claimant establishes by clear and convincing evidence that the harm suffered was the direct result of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(b) Evidence regarding the financial worth of a defendant or the defendant's profits or any other evidence relating solely to a claim for punitive damages under this Act is not admissible unless the claimant establishes, before any such evidence is offered, that the claimant can present evidence that will establish prima facie proof of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(c) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages pursuant to the provisions of this Act regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

TIME LIMITATION ON BRINGING ACTIONS

SEC. 11. (a) Any action for harm arising out of a general aviation accident shall be barred, notwithstanding any State law, unless—

(1) the complaint is filed within two years after the date on which the accident occurred which caused the claimant's harm; and

(2) the summons and complaint are properly served upon the defendant within one hundred and twenty days after the filing of such complaint, unless the party on whose behalf such service is required can show good cause why such service was not made within such one-hundred-and-twenty-day period.

Paragraph (2) of this subsection shall not apply to service of process in a foreign country pursuant to rule 4(i) of the Federal Rules of Civil Procedure or any similar State law.

SANCTIONS

SEC. 12. It is the intent of Congress that, with respect to any action governed by this Act, the sanctions for violation of rule 11 of the Federal Rules of Civil Procedure, including orders to pay to the other party or parties the amount of their reasonable expenses, including a reasonable attorney's fee, be strictly enforced.

JURISDICTION

SEC. 13. (a) The district courts of the United States, concurrently with the State courts, shall have original jurisdiction, without regard to the amount in controversy, in all civil actions for harm arising out of a general aviation accident and in all actions for indemnity or contribution described in section 6(d) of this Act.

(b) A civil action which is brought in a State court may be removed to the district court of the United States for the district embracing the place where the action is pending, without the consent of any other party and without regard to the amount in controversy, by any defendant against whom a claim in such action is asserted for harm arising out of a general aviation accident.

(c) In any case commenced in or removed to a district court of the United States under subsection (a) or (b) of this section, the court shall have jurisdiction to determine all claims under State law that arise out of the same general aviation accident, if a substantial question of fact is common to the claims under State law and to the Federal claim, defense, or counterclaim.

(d)(1) A civil action in which the district courts of the United States have jurisdiction under subsection (a) of this section may be brought only in a district in which—

(A) the accident giving rise to the claim occurred; or

(B) any plaintiff or defendant resides.

(2) In an action pending in a district court of the United States under paragraph (1) of this subsection, a district court may, on motion of any party or its own motion, transfer the action to any other district for the convenience of parties and witnesses in the interest of justice.

(3) For purposes of this subsection, a corporation shall be considered to be a resident of any State in which it is incorporated or licensed to do business or is doing business.

SEVERABILITY

SEC. 14. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 15. (a) This Act shall apply to any civil action for harm arising out of a general aviation accident which is filed on or after the date of enactment of this Act.

(b) If an action governed by this Act is filed within one hundred and eighty days after the date of enactment of this Act, liberal leave shall be given to a party to amend any pleading, motion, statement of jurisdiction or venue, or other matter to conform to the provisions of this Act.

Senator FORD. Our first witness this morning is the distinguished Congressman from Kansas, Dan Glickman. Congressman.

STATEMENT OF HON. DAN GLICKMAN, U.S. REPRESENTATIVE FROM KANSAS

Mr. GLICKMAN. Thank you, Senator Ford and my colleague from Kansas, Senator Kassebaum.

I would ask that my entire statement appear in the record so I could summarize the statement.

Senator FORD. Without objection, your total statement will be placed in the record.

Mr. GLICKMAN. Mr. Chairman, I testified before this committee last year and this year there was a hearing before the Public Works Subcommittee chaired by Norm Mineta of California. At that time I told him I remembered the song called "Where or When,' which starts out "It seems we stood and talked like this before.'

This is an issue that we have been talking about for a long time, and unfortunately there has been no legislative remedy. And in the process, a lot of folks in my town have lost jobs in an industry that was vibrant, a very American industry, particularly in rural America and corporate America, small business.

It has dissipated rather dramatically, and we can do something about that. This legislation offers that opportunity. Therefore it is critical that hearings like this one be held and markups be reported.

I am pleased to report that I have sponsored similar legislation to Senator Kassebaum and yourself. There are over 140 sponsors in the House. I expect to have a majority of the House early next year. Those people have a wide range of different philosophies.

I have been told by Chairman Mineta of the Public Works Subcommittee on Aviation that he will hold a markup on this legislation. 32 out of the 50 members of the Public Works Committee in the House are sponsors of this bill.

So we hope that we can in fact get it moving. It is a very difficult proposition to move because of peculiar problems in terms of who supports and particularly who opposes this bill and how it is tied in with general product liability legislation, which we have tried to separate apart.

But what I thought I would do today, Mr. Chairman, is not tell you what the problem is. We have very capable people, including Mr. Robert Martin from Wichita representing Beech Aircraft, who can go into the peculiarities of the problem. But I think we have got to talk about why this industry is unique and why we need to Federalize liability as it relates to aviation.

First of all, as I say, general aviation products are Federally regulated from design through production and throughout the product's service life, including maintenance activities. Pilots are regulated through training and licensing through the Federal government. Repair and maintenance facilities are regulated. The air traffic control system is regulated.

Therefore, there is no aspect of this industry which is not subject to Federal control. General aviation, as well as all aviation, from birth to death is Federally regulated, substantively regulated.

So why should the liability system be a hodge-podge of different state actions? It does not make any sense in the world. There are a few other industries like this that are Federally regulated, but none where you cannot even take your product and move it unless Uncle Sam tells you you can.

And it does not make any sense to me that there should not be a conforming system of liability around this country to determine how people who are injured can find redress in the courts.

Second, airplane users, the consumer groups in this case, the pilots, the business owners, the AOPA, NBAA, all have a compelling interest in solving this crisis. They are the ones that cannot buy airplanes at current market prices, which have increased by an average of $100,000 per airplane to cover liability costs alone.

Those groups, AOPA, NBAA, and others, support this bill. So one maybe could make an argument in the general product liability area that consumer groups—the Consumer Federation of America and others—have taken opposition to the bill, but in this case we have the support of the manufacturers and the consumers and the users. And I think that this is an area where we have not polarized, like we have in those areas.

Third, general aviation tort law has become highly specialized, with nuances and issues that are not generally considered part of general tort law. Aviation insurance is not included under the antitrust exclusions of the McCarran-Ferguson Act. Thus it is not immune from the antitrust laws.

Reform to this special body of law as a result is distinct and warrants special action, as I have proposed.

Fourth, as I have told you before, I think this is a jobs and a competitiveness issue, and I think you agree with that. The legislation that Senator Kassebaum has proposed is fair and balanced. There are no caps on judgments. There are no limits on contingency fees.

Mr. Chairman, some groups want us to do nothing. Some believe that Federalization of this issue removes the rights of plaintiffs. Some believe that this is the nose under the camel's tent.

I have talked with people, for example, who are involved in the legal profession, of which I am, and they have said to me: Mr. Glickman, your bill is really quite reasonable, but my goodness gracious, if we go down your road and Senator Kassebaum's road, next the door opens to everything else.

Well, I disagree. I have told you, Federal regulation of aviation is unique and justifies a different treatment of liability laws than Federal regulation of paper containers that is not required to be regulated by Uncle Sam at every stage of imagination.

Some people want us to do nothing, quite truthfully, because they are afraid that the merits of the proposal might trickle their way into other liability issues. Well, that may be true, and I happen to support Federalization of liability generally as well, but not at the expense of this particular piece of legislation.

We have a good bill to address a serious national problem. If we do nothing, I believe that the death knell of general aviation comes closer than it ever has been before. We have the opportunity to do something that is balanced, that is moderate, that is fair, that does not take anybody's rights away, that helps an industry do its best to survive.

So I appreciate the fact that you have allowed this hearing to take place. I will do my best to work with you in any way I possibly can on the House side to see that it passes.

Thank you very much, Mr. Chairman.

Senator FORD. Congressman, let me ask one question. You have I think laid out pretty well the progress of your legislation in the House, and with 32 members of the committee as cosponsors that indicates that there may be favorable consideration in the committee.

So your piece of legislation is moving like we hope this one will move here. Am I correct that a large portion of general aviation manufacturing is located in your state?

Mr. GLICKMAN. It is.

Senator FORD. What effects will the bill have on the Kansas portion of the industry?

Mr. GLICKMAN. Well, in my judgment, and the industry will follow me and Mr. Martin will know more specifically about that, it will have a significant stimulus on the purchase of new general aviation airplanes, for a variety of reasons.

One, regularizing liability will reduce the cost of the liability component of an airplane and reduce the costs of the airplane itself.

Second of all, passage of this bill will encourage users who have not bought airplanes, have been big into used, the secondary market of general aviation airplanes—and there are a lot of those around, old technology airplanes—this bill will encourage them, particularly if we have a statute of repose to start buying new airplanes again.

I cannot tell you how many jobs that means. We have lost well over 80 percent of the jobs that we had since I first came into Congress, and that is an awful lot of jobs, not only at Beech, Cessna, and Learjet, but at Piper and all the subcontractors, all the people that have to do business with this.

We have just seen an American industry almost vanish before our eyes. So I cannot tell you for sure what will happen, but it has to be bullish. I truly believe that.

Senator Ford. Is there any difference in the liability of a foreign manufactured airplane than an American manufactured airplane?

Mr. Glickman. In this country?

Senator Ford. Yes.

Mr. Glickman. No, I believe that they are subject—if they are licensed to do business in this country, they are subject to the same laws, assuming that they have assets in this country and can be reached.

Senator Ford. The same liability as it relates to the aircraft?

Mr. Glickman. That is correct.

Senator Ford. Fine. I have no further questions.

Senator Kassebaum?

Senator Kassebaum. I have none either, other than to say that I think, Dan, that you have done a very good job laying out the devastating impact of not having any overall uniform Federal legislation that can help us with this liability issue in aviation.

It is unique and you spelled that out very well. And I think what should concern us is not only the present situation, but the future and the future of general aviation in this regard.

Thank you.

Mr. Glickman. Thank you, Nancy.

Senator Ford. Thank you, Senator Kassebaum.

Thank you, Congressman. Oh, excuse me. I am very sorry.

Mr. Glickman. They use small airplanes in Arizona.

Senator Ford. You came in so quietly. I saw when Jack came in and left, and I thought you went with him. I apologize.

OPENING STATEMENT BY SENATOR McCAIN

Senator McCain. Thank you, Mr. Chairman. I will try to be more visible in my presence.

Senator Ford. You do very well, you do very well.

Senator McCain. Thank you, Mr. Chairman.

I know we have other important witnesses, but first of all I would like to express my appreciation to Congressman Glickman for the leadership he has displayed on this issue for a long, long time.

I had the privilege of working with him in the House and he is of course one of the most highly respected members. But also, on this issue he is perhaps the most knowledgeable.

And Dan, I would just like to make a couple points that perhaps you could comment on, one on another issue that the chairman has been very interested in, and that is the problem of airline safety.

Witnesses, expert witnesses before the Aviation Subcommittee, have stated that we have fewer and fewer qualified pilots to move into the pilot and copilot positions on the airliners. And with the recent crash up in Denver, as you know, there is some question about the experience of both pilot and the copilot.

A number of expert witnesses have pointed out to this committee that the lack of ability of young men and women in America to fly small airplanes because they simply cannot afford it, and the disappearance of the general aviation industry in this country, are going to have an impact ultimately on aircraft safety, and airline safety, which I think is an important point.

The other important point I think is the issue of the trade imbalance. If all the aircraft that are used in this country are made overseas. I is going to have significant impact not only on jobs, but on our continuing problem with the trade imbalance.

And I do not have to tell anybody on this panel that one of the most important aspects, not just of the economy of Kansas but of this entire nation, was the thriving domestic general aviation industry we had in this country, which we are now seeing disappear.

I think it is important to point out that a $70,000 per airplane insurance cost added onto the cost of an airplane is not going to bode anything or foretell anything but the demise of the general aviation industry in this country.

The position of the trial lawyers that this somehow, as you mentioned in your statement, would open the door for further legislation which would be restrictive in nature, I find bogus and I find it in fact an insult to the intelligence of those of us who are familiar with the issue.

Mr. GLICKMAN. I would just comment on the safety issue, because I know that you and especially Senator Kassebaum and Senator Ford have been involved in this. What we are doing in the current system is encouraging the domination of this market by older and older airplanes, because it is too expensive to buy new ones.

And so older and older airplanes are not retrofitted for the most part with newer and newer equipment, whether it is collision avoidance type equipment or newer engines and that kind of stuff.

So in a curious bit of irony, what we are doing through failure to pass this legislation is probably encouraging older technology in the skies, not newer technology. Now, that is exactly what I would think that those who are interested in safety would be opposed to.

Those who are here testifying at the end of this hearing that they do not want to see any change would want us to have newer airplanes on the market that could maybe have all sorts of systems and that could avoid collisions and all this kind of stuff.

These same people are encouraging the technology not to move forward, because you cannot afford to buy these newer airplanes.

Senator MCCAIN. Thank you.

Thank you, again, Dan. And I hope that we would have the opportunity of moving forward with this legislation. The problem has been with us for a long time and I am hopeful we can see some action in this Congress. Thank you, Dan.

Thank you, Mr. Chairman.

Mr. GLICKMAN. Thank you very much.

Senator FORD. Thank you very much.

[The statement follows;]

STATEMENT OF HON. DAN GLICKMAN, U.S. REPRESENTATIVE FROM KANSAS

First I want to thank Chairman Ford for holding this most important hearing on the product liability problems facing the general aviation industry. Each day as more and more jobs are being lost and fewer and fewer general aviation planes are being manufactured in this country, the necessity for action on our part becomes even more clear. Time is running out for this industry and therefore it is critical that hearings like this one be held and that you proceed to mark up the legislation I have introduced in the House and Senator Kassebaum has here in the Senate. My bill is H.R. 2238, the General Aviation Standards Act. Here in the Senate, the bill is S. 473, the General Aviation Accident Standards Act.

Of all the Committees looking at this, I am confident that this Committee, with its long interest and dedication to aviation and its work on this in the last Congress, will recognize the desperate situation of the general aviation industry, take the lead on this matter and report this bill without delay. I am pleased that support for this legislation grows each day in the House with over 140 cosponsors from both parties holding a wide range of differing philosophies. I am hopeful that this hearing will impress upon my colleagues the seriousness of the crisis and the need for this type of legislation being enacted this session.

Being from Wichita, the home of Cessna, Beech and Gates Learjet, gives me a special understanding of the problems now faced by the general aviation community. Paramount among these is the dramatic increase in product liability costs which burdens both manufacturers and consumers. Driven by sizable and unpredictable court judgments and settlements, the product liability costs facing aircraft manufacturers are literally destroying the viability of this industry. In some cases, insurance costs alone now exceed labor costs, averaging $100,000 per airplane. In 1979, over 17,000 general aviation aircraft were sold by U.S. manufacturers, while in 1986 there were only 1495 sales. That is a decline of nearly 90%. This situation is clearly reflected in an analysis by the Commerce Department of American industries and their growth, which showed that the general aviation industry ranked 211 out of 211 industries rated and the sewing machine industry, which was rated just ahead of general aviation, did significantly better. Unfortunately, had there been more industries rated in the analysis, it is very likely general aviation would probably still have been last on the list. This presents a very bleak picture, one which I feel could destroy the nation's general aviation industry unless we move forward H.R. 2238.

This problem doesn't just affect manufacturers. It is a problem for general aviation users who are faced with aircraft prices which have become prohibitive to many. This in turn creates a safety problem because it is keeping some aircraft flying that should be retired. Owners are stretching out the use of their aircraft instead of buying newer and safer aircraft with price tags that include high liability insurance premiums.

The most obvious and troubling outgrowth of this dire situation, however, is the loss of jobs to those who rely on this industry for their livelihoods. In my district alone, over 25,000 people have been laid off from their aviation industry jobs. Wichita does not stand alone in this crisis. One of our colleagues from Pennsylvania informed me that the Lycoming Company, a manufacturer of piston engines in Williamsport, laid off over 1200 workers between 1981 and 1985. The company is now operating at 20% of its operating capacity. Other areas have also been hard hit, as Committee members are likely aware, and need relief.

There is no question that something must be done now to turn this situation around. H.R. 2238 is aimed at addressing one key problem facing the aviation industry. Specifically, the bill would provide uniform rules of liability law for losses resulting from general aviation accidents. Unlike other product liability bills, this legislation is a moderate approach. It does not cap damages nor does it cap attorneys' fees. It is based on careful studies and consideration of the various measures that have been considered in the past, plus the special issues that are involved in aviation accidents. It is designed with the interests of both those who use and those who manufacture planes in mind. It is fair and balanced legislation. Becuase of this balance, the only really relevant consumer groups, the owners and operators of these planes, as represented by the Aircraft Owners and Pilots Association, the National Business Aircraft Association and others, have come on board as advocates of the bill.

To highlight the main features of our bill:

1. The Federal courts would have jurisdiction over all general aviation cases in light of the fact that the industry is federally regulated from top to bottom. All general aviation accident cases would be subject to its substantive provisions, whether the case is filed in State or Federal court.

2. Damages would be based on comparative responsibility, with damages allocated among responsible parties on a percentage basis.

3. Manufacturers would be jointly liable for a product defect—but no parties other than manufacturers would be jointly liable.

4. Manufacturers of airframes, powerplants, components and subassemblies could be held liable for equipment which is "unreasonably dangerous for its intended purpose" as well as for negligence. They would also be held liable for failure to supply reasonable warnings against dangers which are known or should have been known to the manufacturer.

5. Non-Manufacturers (Pilots, Fixed Based Operators, Air Traffic Controllers, etc.) could be held liable only for their own actions.

6. Manufacturers would be given certain defenses to liability including a state of the art defense and a defense that the plaintiff misused the product.

7. Evidence of claims for punitive damages could be presented at trial only if the claimant first shows that there is reason to believe that the defendant acted with a conscious flagrant indifference to the safety of others.

8. Evidence of income tax liabilities and other payroll deductions which diminish earnings claimed to have been lost would have to be considered at trial.

9. The liability of manufacturers and suppliers of repair and replacement parts or components would be limited to a period of 12 years.

10. Attorneys' fees could be recovered by the winning part if it could be shown that the other party's claim was frivolous.

While I realize that other industries have confronted product liability problems, I think it is clear, for a number of reasons, that aviation warrants special consideration irrespective of whether action is taken of a general product liability bill. First and most importantly, this industry is unique in the extent to which the Federal Government is involved in its operation. General Aviation products are federally regulated from design through production and throughout the product's service life including maintenance activities. Pilots are regulated through training, licensing and operating procedures. The mechanics and repair facilities that maintain the products are also regulated as to the training and scope of the work they perform. The air traffic control system, on which pilots rely, is federally operated and interstate in scope. Indeed, there is no aspect of this industry which is not subject to federal control.

Second, as noted above, airplane users, the relevant consumer group in this case, have a compelling interest in resolving this crisis. They are the ones who cannot afford airplanes at current market prices, which as I noted, have increased by an average of $100,000 per airplane to cover liability costs alone. This reality has led the Aircraft Owners and Pilots Association, the National Business Aircraft Association and others to take an active role in working toward passage of this legislation. The support of aviation consumers is unique in the product liability arena, which has generally been polarized with consumers and advocates of tort reform pitted against one another.

Third, general aviation tort law has become highly specialized with nuances and issues that are not generally considered part of general tort law and aviation insurance is not included under the anti-trust exclusions of the McCarran-Ferguson Act. Thus it is not immune from the anti-trust laws. Reform to this special body of law, as a result, is distinct and warrants specific action as I have proposed.

I urge you to closely consider the testimony you are about to hear and realize that, without your support, a vital industry could likely die.

Senator FORD. The first panel of witnesses will consist of three gentlemen: Edward W. Stimpson, President of the General Aviation Manufacturers Association; Frederick B. Sontag, President of Unison Industries and Slick Aircraft Products; and Robert Martin, Senior Partner of the law firm in Wichita, Kansas.

Mr. Stimpson, we will ask you to go first.

STATEMENT OF EDWARD W. STIMPSON, PRESIDENT, GENERAL AVIATION MANUFACTURERS ASSOCIATION

Mr. STIMPSON. Thank you, Mr. Chairman. Thank you very much for having this hearing today. Mrs. Kassebaum, Senator McCain.

Mr. Sontag, as you mentioned, is President of Unison Industries, manufacturer of magnetoes in Rockford, Illinois, which makes components for general aviation airplanes, a small business. And Mr. Martin from the Martin, Pringle law firm in Wichita, Kansas, has been very active in this legislation and has been associated with Beech Aircraft for a number of years.

I know that aviation safety has been a matter of major concern to this committee this year, and fortunately the general aviation accident rate, as you see from the chart, has continued to improve for the last 40 years. And last year was the best year in the history of general aviation.

And this is certainly not an accident in its own right, because much has been done by both government and industry to improve general aviation safety. Training has gotten better, airplanes are better.

I think some of the actions that you have taken yesterday in the conference on improving our airport and airways system, legislation on Mode C, more reliever airports, are all certainly helpful and have contributed to this ever improving safety record.

Nonetheless, this legislation is badly needed that you are considering here in this committee, for a number of reasons. The vitality of the general aviation manufacturing industry has been severely impaired.

Mr. Glickman mentioned that several years ago we were doing nearly 18,000 airplanes a year. This year the industry will deliver slightly over 1,000 airplanes. Needless to say, a drop from 18,000 to 1,000 has severely impacted employment in the industry. The employment today is only about 70 percent less than it was several years ago in the early eighties and the late seventies.

Now, product liability costs remain the single largest factor in the production of a new single engine piston airplane today. Many models are no longer being produced. No new training aircraft are being made in the United States today.

And this factor that you were just talking about a minute ago, the colleges and universities who are trying to cope with the ever-increasing pilot shortages cannot buy new airplanes today. They are going out and they are buying remanufactured airplanes.

They are searching throughout the whole country, looking where can we get low time used airplanes that we can fix up and put in our colleges and universities, so we can meet this pilot demand.

There is a real message here, and the fact that we are not producing new training aircraft in the United States today is really a tragedy. And I think the witness before the committee here last week, Colonel Borman, I understand gave an unexpected boost to this legislation when he talked about, you know, I am no longer sitting in an airline corporate office, but I am out here flying on weekends, I am going to airports; I see people who are not learning to fly.

You see what is out there in costs, and I think any objective observer of what is going on out here in America certainly recognizes we have a problem.

Mr. Glickman mentioned that the general aviation fleet today is an aging fleet. There are 215,000 airplanes in that fleet. The average age of a single engine airplane out there today is 20 years of age.

Just imagine how many automobiles, if the fleet out there was 20 years of age, there would be in the automobile fleet. Over half the fleet of the aircraft today was built in 1968 or before. Over a quarter of that fleet was built in 1958 or before.

Now, the product liability situation in general aviation is not improving. We as manufacturers remain responsible for this aging fleet. Product liability costs have not abated. Judgments, verdicts, high defenses, settlement costs, are all contributing to the current situation.

And this is really not an insurance issue. Some general aviation companies today are completely self-insured. Others are self-insured up to levels as high as $100 million. And the current system is driving up costs, and it is not the rates or availability of insurance.

I wanted to point to this chart on the right here, where you see that the accident rate in general aviation has been coming down consistently over the last 40 years. So you would think the product liability costs would somehow reflect that.

But look what has happened since 1977. Paid claims, the amount that manufacturers paid out, in 1977 was something like $24 million. In 1985 it was $210 million, on sales of a little over a billion dollars. So that red line is going straight up while the accident rate has gone down. That really tells a story.

As Mr. Glickman pointed out, S. 473 has the support of every major general aviation group, not only the ones that are going to be testifying this morning, but NATA, the Helicopter Association International, the Experimental Aircraft Association, the National Aeronautics Association.

Every major general aviation publication has editorialized in favor of this legislation. So it does have broad-based support in the entire general aviation community.

And as was discussed earlier, this legislation also has broad support in the other House of Congress.

It was mentioned about foreign competition. I think there is a competitive factor. The foreign manufacturers do in the United States sell their products. They do have to abide by the laws of this country. They are facing a different situation. They do not sell all their airplanes in the United States.

The laws in the country in which they are licensed to sell their airplanes as well are different, and we are in a competitive situation.

A few years ago there were virtually zero single engine airplanes coming into this country. Last year for the first time we saw a significant impact of single engine airplanes coming in here.

So I think the foreign competitive situation is certainly a very important factor in this. I would like to thank you for your attention and would now like to call on Mr. Sontag who also serves as chairman of our product liability committee within our association.

[The statement and questions and answers follow:]

STATEMENT OF EDWARD W. STIMPSON PRESIDENT GENERAL AVIATION MANUFACTURERS ASSOCIATION

Good morning, Mr. Chairman and Members of the Subcommittee. I am Edward W. Stimpson, President of the General Aviation Manufacturers Association which represents air frame, engine, avionics and other component manufacturers. Collectively, our membership accounts for 95 percent of the general aviation manufacturing activity within the United States.

After examining the devastating impact that product liability is having on the general aviation industry, the full Commerce Committee last year reported—without objection—S. 2794, the General Aviation Accident Liability Standards Act of 1986. We deeply appreciate this action and hope the Commerce Committee will favorably report S. 473, which is identical to the bill reported last year.

Aviation safety has been of major concern to this Committee this year. Significant and far reaching legislation has been reported and enacted by the Senate. The general aviation safety record also continues to improve. Both the government and the aviation community are working closely together on improving general aviation safety even further.

Nonetheless, this legislation is urgently needed for several reasons:

1. The vitality of U.S. general aviation manufacturers has been severily impaired. Unit deliveries have plummeted from over 17,000 in 1979 to about 1,000 this year.

2. Product liability costs remain the single largest cost element facing the producers of piston engine aircraft. Many models of piston aircraft are no longer being produced. No new training aircraft are being made in the United States.

3. The U.S. general aviation fleet of approximately 215,000 aircraft is an aging fleet. The average age of a single engine aircraft today is over 20 years.

4. Product liability situation in general aviation is not improving. Manufacturers are still responsible for the aging fleet. Product liability costs have not abated. Judgements, verdicts, high defense and settlement costs all contribute to the current situation.

. General aviation liability issue is not an insurance issue. Some general aviation companies are completely self-insured. Others are self-insured up to levels of $100 million. The current tort system is driving up costs, not rates or availability of insurance.

6. S. 473 has the support of every major general aviation consumer group and publication. These groups are concerned about the future of the industry. They want new products at reasonable costs.

7. This legislation has wide based support in the Congress. In addition to bipartisan support in the Senate, over 140 Members of the House of Representatives have now cosponsored similar legislation.

It is highly appropriate that the Subcommittee on Aviation take the lead in shaping general aviation liability reform legislation. As you know, the Federal government, through the FAA, regulates virtually every aspect of the general aviation industry. From design through production, operation, maintenance and even accident investigation, Federal rules apply. Importantly, questions regarding these rules and regulations are often key elements in general aviation tort liability cases. A federal tort statute is a logical and necessary complement to such extensive regulation.

General aviation plays an important role in our Nation's integrated transportation system. An active fleet of 215,000 airplanes services over 5,000 public use airports compared to 4,600 commercial carrier aircraft servicing 850 airports. General aviation flies 36 million hours annually—four times the hours flown by the airlines. In addition to the personal and business transportation role that general aviation plays, it also provides air ambulance services, aerial surveillance, law enforcement, overnight mail services and high speed jets for organ transplant missions.

It is important, I believe, to review the recent history of general aviation in this country. What was once a booming domestic manufacturing industry, accounting for over 17,000 unit deliveries in both 1978 and 1979, is now an industry that has suffered annual decreases in shipments to the record low of 1,495 airplanes delivered in 1986. Expectations for 1987 are lower yet.

A number of economic factors contributed to this decline in the early 1980's, but many factors, such as high interest rates and overall economic recession, have disappeared. The one factor that persists and continues to worsen is our industry's product liability cost. In 1977, the paid claims for judgements, settlements and defense amounted to $24 million compared with revenues of $1.49 billion. In 1985, the product liability paid claims had skyrocketed to $210 million with revenues about the same. These costs have grown despite the fact that the general aviation accident rate has shown steady improvement since 1946. In fact, according to National Transportation Safety Board data, 1986 was the best year in general aviation history.

This improving record is the result of a conscious and determined effort by the aviation community. The airplanes we build today are safer and better aircraft than the ones we built before. Manufacturers know that airplanes must have good safety records in order to sell. FAA standards continue to become more stringent as the availability and affordability of technological advancements are improved. Government, industry and user group efforts, directed at accident prevention, have shown that pilot education can reduce accidents, and have taken aggressive steps to improve education. All these factors, which collectively have reduced the accident rate, have not reduced the manufacturer's product liability burden.

NTSB data continues to show that pilot error is the cause, or an important contributing factor, in over 80 percent of the fatal general aviation accidents. In a recent Flying magazine article, noted author J. Mac McClellan examined NTSB data on 222 accidents involving three popular models of general aviation aircraft to determine which design was safest. What McClellan found was that out of 222 accidents, only six could be directly attributable to the failure of the aircraft. Yet, in many of these accidents, manufacturers are still assumed to have the "deep pockets" with which to pay damages.

The high cost of product liability, like any production costs, must be passed on to the purchasers of new aircraft and of spare parts for older aircraft—and these liability costs have devastated the market. Piston engine-powered airplanes, which have historically accounted for 90 percent of unit sales, are practically out of production. Cessna Aircraft, the world's largest general aviation manufacturer, completely suspended piston engine-powered aircraft production last year. No trainer aircraft are now being produced in this country and industry unemployment is nearly 70 percent. The single most important factor in the resumption of single engine-powered airplane production is the resolution of the product liability problem.

Historically, general aviation has played an important role in the international trade arena. Prior to 1981, the U.S. general aviation industry enjoyed a positive trade balance which contributed to our nation's trade surplus. Since 1981, the general aviation industry has had a negative trade balance, due in part to our growing product liability problem which is eroding our competitive position in several ways.

U.S. manufacturers are liable for their products under the U.S. tort system regardless of where harm might be incurred. In fact, we see cases being brought back to the United States when accidents have occurred in foreign countries. Foreign manufacturers are liable under U.S. laws only for their products which are operated in the United States. In most cases, this is a very small percentage of their total in-service fleet which entails a significant risk differential from the American manufacturers. This disparity provides a competitive foreign cost advantage.

Another competitive factor is the number of aircraft for which a given manufacturer is responsible. As of December 31, 1985, there were over 188,000 active piston engine-powered aircraft in the U.S. About 98 percent of these are U.S.-built. This is an enormous and aging fleet for which our manufacturers remain liable in most states. Half of these airplanes are over 20 years old; one quarter are over 30. Our liability costs due to this huge liability "tail" far exceed those of our foreign competitors who have comparatively few aircraft in service, giving them a considerable competitive advantage.

The U.S. International Trade Commission issued a report, in March 1986 entitled: "Competitive Assessment of the U.S. Commuter and Business Aircraft Industries." It examines a number of competitive advantages enjoyed by foreign manufacturers and reaches the following conclusion:

"Foreign producers of commuter and business aircraft generally do not bear the same type or amount of product liability insurance burdens that domestic manufacturers endure. This is partly due to the fact that it is very difficult to recover damage claims from companies located overseas. Also, foreign industry officials state that since they chose not to produce and/or sell smaller aircraft in the U.S., their firms do not have as high a level of product liability insurance to add into the price of their airplanes."

The one area in which we have been able to counter the growing foreign cost advantages has been our edge in technology. This edge is eroding, and with good reason. Many foreign manufacturers make excellent products and they also receive strong support from their governments in the form of subsidies to assist in product development and marketing. We may no longer enjoy the sales volume which can support a significant R&D effort, and the risks associated with new products and processes are often too high to justify their introduction. We are inexorably losing our competitiveness.

Some observers say that the insurance industry is responsible for the product liability crisis. They claim payments exceeded premium revenues in the early 1980's and they have been making up the difference with substantially higher premium rates in the last few years. Whatever may be the case with other industries, it is not true for general aviation.

Premiums have indeed skyrocketed, driven by huge judgements, settlements and defense costs, not the number of suits filed—which has remained relatively stable. In 1981, five percent of the dollars paid were for awards or settlements in excess of $1 million. By 1985, 30 percent of the dollars were for awards or settlements in excess of $1 million.

The number of insurance companies and underwriters available to general aviation manufacturers for product liability coverage is extremely limited. There are less than a dozen major underwriters of aircraft product liability insurance worldwide, and most of those insurers are located outside of the United States.

The availability of insurance coverage for general aviation has virtually disappeared over the past few years. Some general aviation manufacturers are completely self-insured. Other companies are self-insured up to levels of $100 million.

Aviation product liability insurance is generally not regulated at the state level. Aviation underwriters are not exempt from the anti-trust laws under the McCarren Ferguson Act which is applicable to other forms of insurance that are regulated by the various state insurance commissions and agencies. Aviation insurance is an unregulated industry with respect to rates and coverage: repeal of the McCarren Ferguson Act would have no impact on the general aviation product liability crisis. The general aviation problem is rooted in our nation's legal system; it is not just an insurance problem.

Our manufacturers recognize their responsibility not only to build quality products but to stand behind those products as well. The rights of the consumer are a very legitimate concern, and S. 473 was drafted with consumer interests in mind. The bill contains no caps on damages nor does it impose any constraints on the contingency fee system. What it does do, however, is place responsibility where it belongs—with the culpable parties, and not necessarily on the shoulders of the manufacturer with the "deep pocket".

The aviation consumers who would be directly affected by this bill support it. Virtually every general aviation consumer group and trade publication supports and encourages passage of S. 473. They recognize that changes to the system must be made if new airplanes are to be produced and parts are to be available at affordable prices.

The Aircraft Owners and Pilots Association, the Experimental Aircraft Association, National Business Aircraft Association, Helicopter Association International, National Air Transportation Association, National Aeronautic Association and National Agriculture Aviation Association are among the groups ready to tell their own story on the importance of the legislation.

HOW WOULD S. 473 HELP?

1. S. 473 would establish a uniform federal law and eliminate the forum shopping or the often difficult conflict of law choices that must be made because the financial results of a case often depend on the state laws that are applied. Every aspect of general aviation activity, except tort litigation, is federally regulated. It would eliminate uncertainties, such as the following:

"....The choice then, appears to be between Texas law and Georgia law. The choice is an important one given the differences between Texas and Georgia law. For example, Georgia still follows the pecuniary loss rule in wrongful death cases, but apparently does not allow reductions for personal consumption expenses of the decedent. GA Code Ann $105-1301(1). Texas law is opposite on both counts. Ruth Henderson Moorhead, et al. v. Mitsubishi Aircraft International, Inc., et al. Lynda M. Hutchinson, et al. v. United States of America, et al. Rose Marie Baker McNeill, et al. v. Mitsubishi Aircraft International, Inc., et al. United States District Court, E.C. Texas, Marshall Division, Nos. M-81-127-CA, M-83-65-CA and M-83-140-CA, June 19, 1986, 639 F. Supp. 385. Section 11. Liability; A. Conclusions of Law, paragraph 5.d., last sentence including the note.

2. S. 473 would recognize the pilot's obligations and the need for careful maintenance and operation, particularly for older aircraft, which, when coupled with FAA's rules requiring correction of defects and notification to pilots, would allow, without disadvantage to the public, a finite end to the manufacturer's liability for claimed defects after a reasonable period of time. Aircraft last an extraordinarily long time as evidenced by the fact that over one quarter of the general aviation fleet was built before 1958. S. 473 would establish a fair and realistic time for the manufacturer to be responsible in tort actions for his product. The manufacturer would, of course, continue to be responsible, under FAA regulations, for defect corrections and notification to operators. The bill would not permit unreasonable cases such as the following:

"......On May 5, 1979, Paul Walter purchased a 1954 Cessna 195 B airplane in Tampa, Florida. Walter, an experienced pilot, had been looking for this specific type of aircraft for some period of time.....Prior to the sale, he flew the airplane several times and had a mechanic verify its airworthiness.....He then took off from the airport, and moments later, the airplane crashed....Walter then averred that Cessna was guilty of negligence because it had knowledge that failure to have quick drains added onto the plane would be dangerous; yet, nothing was done to warn of the plane's dangerous condition without the quick drains....." Paul Walter and Jean Walter v. Cessna Aircraft Company. Wisconsin Court of Appeals, District 11, No. 83-2069, October 24, 1984

3. S. 473 would establish true comparative fault. Aircraft manufacturers would continue to be responsible for their products, but they would not be responsible for actions beyond their control. Today, manufacturers are often forced to pay damages that exceed their degree of fault in an accident.

"...In a previous, underlying cause of action for personal injuries arising out of a plane crash, a joint and several judgment was rendered against plaintiff Piper Aircraft Corporation, defendant Logan, and defendants Berz. We are asked to determine whether, in this action for contribution, plaintiff Piper Aircraft Corporation may recover of defendants Logan and Berz such amounts as it has paid to the injured persons, over and above its pro rata share....." Piper Aircraft Corporation v. Gerald M. Dumon, Administrator of the Estate of David W. Logan, deceased and Milton H. Berz, Jr., and Mary Jane Berz, Individually and d/b/a Berz Flying Service, Jointly and Severally. Michigan Supreme Court, No. 70006, Filed December 28, 1984, Released February 1, 1985.

CONCLUSION

In conclusion, Mr. Chairman, the general aviation industry is unique in the degree—virtually 100 percent—to which it is federally regulated. Only in tort litigation is it subject to the widely differing vagaries and varieties of state laws. A federal statute would inject some sense of stability, predictability and uniformity into this current amorphous system.

Our manufacturers have repeatedly said that they will continue to accept responsibility for their products and S. 473 (and FAA's regulations) would ensure that they do. It is fair to all concerned, and that is why it is supported by both the manufacturers and the users. It imposes neither caps on damages nor constraints on the contingency fee system, thereby making no change to the way our legal system operates. In short, S. 473 places responsibility where it belongs, uniformly, as determined by the court.

The product liability situation facing general aviation is very serious. Prompt action on this bill could be instrumental in helping resuscitate the U.S. general aviation industry and helping it regain the preeminent position it occupied just a few years ago. Failure to take such responsible action may well contribute to the death of a once thriving domestic industry.

[The following information was subsequently received for the record:]

ERNEST F. HOLLINGS, SOUTH CAROLINA, CHAIRMAN

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W. ALLEN MOORE, MINORITY CHIEF OF STAFF

United States Senate
COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, DC 20510-6125

December 21, 1987

Mr. Edward Stimpson
President
General Aviation Manufacturers
Association
Suite 801, 1400 K St., NW
Washington, DC 20005

Dear Mr. Stimpson:

The Commerce Committee appreciates your assistance in providing testimony on S. 473, the General Aviation Liability Standards Act. As a result of the testimony at the hearing, the Committee members have additional written questions for response.

Enclosed are written questions that I would like you to answer for the record to assist me in consideration of this matter. The record will remain open for your written answers until January 8, 1988. Should you need any further information, please contact Steve Palmer (224-9350) or Linda Lance (224-0415) of the Committee staff.

With kindest regards, I am

Sincerely,

Fritz Hollings

ERNEST F. HOLLINGS
Chairman

Enclosure

1. You testified about your preference for comparative responsibility and limited joint liability because that could limit the percentage of the total damages that a particular manufacturer would pay. Obviously that would benefit the manufacturer. I'm concerned about the claimant and his ability to recover the full amount of his damages under the bill's standards. Could you comment on that issue?

2. Uniformity in the law and predictability of litigation results are often cited as a basis for lower insurance rates. However, it appears to me that uniformity in the law is unlikely to result from this bill given the number of available forums for litigation it creates. Additionally, I understand some states that have enacted tort reform have not experienced a corresponding decrease in insurance rates. Do you expect this bill to result in lower insurance rates for you? Why or why not?

3. Please provide detailed information regarding the manner by which GAMA members are typically insured against liability for accidents. If there is no "typical" method or methods, please provide information for at least three of the GAMA members with the highest gross income per year for the most recent fiscal year. Include information about any insurance companies that are wholly or partly owned by GAMA members.

General Aviation
Manufacturers Association

Suite 801
1400 K Street, N.W.
Washington, D.C. 20005-2485
(202) 393-1500

January 7, 1988

The Honorable Ernest F. Hollings, Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Chairman Hollings:

In reply to your letter of December 21, 1987, I am forwarding answers to your three questions. Should you need any additional information, please let us know. I am also replying on behalf of Mr. Sontag and it is my understanding that Mr. Martin has replied directly to you.

ANSWERS

1. One of the reasons for favoring comparative responsibility is, of course, the likelyhood that the amount a manufacturer would have to pay of the total judgement would be less. Limitation of joint liability to those persons the manufacturer had control over, his suppliers, would return an element of fairness to situations where juries make findings, based on emotion, of a miniscule one or two percent manufacturer liability, where in fact the manufacturer was responsible for none of the harm.

Equally important, if not more so, is our view that this change in tort law will enhance safety and will contribute to the continuing reduction in accidents. As was noted during the discussions of the General Aviation Accident Liability Standards Act of 1986 "...the committee believes that legal rules which fail to hold the person proportionally responsible for damages caused by unsafe actions undermine the specific federal policy promoting the exercise of safety by all persons involved in general aviation. A rule permitting the imposition of the claimants entire damages on a defendant whose conduct may have been a minor factor in causing the harm lessens the incentives necessary for a safe general aviation system." [Senate Report No. 99-428, September 3, 1986, page 12, 3rd paragraph]

2. A key provision of this bill is the establishment of federal question jurisdiction. Under this bill there would be only one body of substantive law, federal law, not 50 differing state laws, covering litigation of claims involving general aviation

accidents. Today, federal courts must use the substantive law of the state in which the Federal Court resides. Though it is possible that each federal district court could interpret this body of federal law in such a manner as to differ from other district courts, such differences could exist only until the respective Federal Courts Circuits establish the federal common law that must be observed within those Circuits. Should the Circuits disagree on substantive matters of law, then, of course, the Supreme Court is available to resolve such differences.

This bill would further mandate that should an action be brought in a state court (and not removed to a federal court), that state court would have to use the federal substantive law to determine liability. GAMA does view this bill as a means to decrease insurance rates. We believe the bill will substantially reduce or eliminate plaintiff forum shopping that depends on the vagueries and varieties of state laws that affect the outcome of cases, usually adverse to the manufacturer.

We expect that the bill will, eventually, make it plain that all persons will be held responsible for their own actions, with less ability to shift the consequences to a deep pocket. Hopefully, this will translate into aircraft operators and owners carrying adequate comprehensive insurance, covering themselves and their passengers. Hopefully, this will mean that those who service and repair aircraft carry adequate insurance to cover the results of potential lapses in their work. With the corrections to the tort system that today favors a few at the expense of the many, we expect that insurance rates for pilots, operators and those who service and repair aircraft will fall. In addition, the liability costs to the manufacturers, either through self-insurance or through purchased insurance, will likewise fall, thus making aircraft and aircraft spare parts available at lower costs. We expect that over time these reductions would be substantial.

3. Until the product liability crisis exploded in general aviation, manufacturers were generally insured by one of several insurance companies that specialized in general aviation product liability. This market has always been limited, with relatively few companies in the U.S. and overseas handling this type of insurance.

As the problem in general aviation worsened, there was an increasing trend towards self-insurance. The levels of self-insurance have generally continued to rise. For example, Piper Aircraft Corporation is now completely self-insured.

Cessna Aircraft Company is self-insured for the first $100 million. Beech Aircraft Corporation has supplied information directly to you. The Beech information reviews in some detail the operation of their insurance company.

Sincerely,

Ed Stimpson

Edward W. Stimpson
President

Senator FORD. Mr. Sontag?

STATEMENT OF FREDERICK B. SONTAG, PRESIDENT, UNISON INDUSTRIES, INC.

Mr. SONTAG. Thank you Ed.

Senator, I feel like what Yogi Berra said is true. It is like deja vu all over again. Last year, I sat in front of this subcommittee--

Senator FORD. Does that mean the fat lady has not sung yet?

Mr. SONTAG. I hope the fat lady has not sung, but I am looking around the room to see if she is here.

Last year I sat in front of this same subcommittee and testified on virtually the same bill. In fact, if you look back in your record you will probably find a written record of that statement.

I have also submitted a written statement for this testimony, but I would like to depart from it if I could and have my statement statement put into the record.

As Ed mentioned, this bill is supported by all of the user groups of General Aviation. That means that all of the people who buy and fly our airplanes are in support of the legislation. To our knowledge, there is really one one group who really opposes it, and has in fact made their opposition known, and will testify here today. And that is the American Trial Lawyer's Association. That is a group of what I think is about 60,000 attorneys. I am sure that you are all familiar with the group.

I personally have heard testimony from the trial lawyers. I have had discussions with members of the trial lawyers association. I have even had debates with members of the Association regarding this bill. So I am fairly familiar with their position and what their opposition to the bill is.

As I see it, there are three major sticking points that they have with the legislation.

The first sticking point is best exemplified by a statement made by Mr. Hvass, which was made before a subcomittee on the House side in oppisition to the House version of this bill just a few months ago. In his words, he says, "The primary incentive to build safe airplanes which meet today's technology is coming from the civil liability system."

What he means is the primary motivating factor for a manufacturer to build a better airplane and a safer airplane comes about through our litigation system, through litigation and the threat of litigation.

As I listen to that statement, I think of my impression of Gorbachev a couple of days ago on TV. I think they have a different perspective of the problem than most of the people in American industry and most of the citizens of the United States. I fly General Aviation airplanes. My family flies in General Aviation airplanes. My employees fly in airplanes manufactured by General Aviation Manufacturers. All of their families fly.

Do they really think that I and the managers of my company would hold back an improvement in our product that could add to the safety of our product when I have such a vital interest in the industry. If you search around the General Aviation industry, you will find that in general the designers and the manufacturers of those products fly their own planes.

Those people make the safety improvements because it is right to do it. Not because they are afraid of litigation. And there is where I think the trial lawyers are a little off base. The record will surely show that if you look over the last 30, 40 years, most of the technological improvements and safety improvements in airplanes came about voluntarily on the part of the manufacturers, and not due to litigation or the threat of litigation.

In fact, most manufacturers improve their products constantly from the date they are certified by the FAA. If the designs were frozen as sometimes you will hear the trial lawyers say, then we would not have a need for engineering departments in most of the General Aviation manufacturers. You would see drawings turning yellow on the engineering shelves. That is not the case.

I know that the trial lawyers today, through their representative, will speak to examples where litigation or the threat of litigation in their opinion has led to a safety improvement. In fact I notice that hr brought a model airplane here today. I am sure that similar to what he probably did in trial somewhere he will show you and take you through the steps of how he thinks that his litigation has shown that a manufacturer's product was deficient from a safety standpoint and how that litigation led to an improvement.

When you hear the end of that speech you probably ought to listen to Bob Martin over here who will have a different opinion. In fact, if you talk to most of the people in the industry, the position that the safety improvement came about as a result of the litigation is debatable.

Contrary to the belief that litigation or the threat of litigation leads to safety or technological improvements, it actually can do the opposite. The threat of litigation can delay engineering improvements, because engineers are afraid to change their products for fear the changes will be used against them in litigation sometime later.

The threat of litigation can drive away the vendors from an aviation supplier on whom they are reliant to improve their products. And, moreover, the threat of litigation and litigation itself can take valuable management and engineering time away from the organization that ought to be utilized to improve the product.

As a result, I would have to say that the civil justice system can actually slow the process of technological change and safety innovation.

The second thing that you will hear from the trial lawyers, excuse me a second. I stayed over night in the University Club next to the Russian Embassy. I think I got the water microwaved out of me.

The next thing you will hear——

Senator FORD. Does that mean you are radiating today?

Mr. SONTAG. I hope I am not radioactive, but I know I am sure dry.

The next thing you will hear from the trial lawyers is that this is just an insurance problem. And similar to the problems that we heard about in the past year which made front page of every news magazine and newspaper throughout the United States, this problem will go away. I have heard this quite often.

If you look at the data that is presented on this chart, you will see that that is not really quite true. The numbers reflect that back in 1977, there were $24 million of real pay outs in product liability.

When I say real pay outs, I am talking about defense costs, and I am talking about settlements and judgments. Real costs associated with product liability have risen in less than ten years to $210 million. So this is a real cost problem. Those are not insurance premiums, those are real costs.

Second, the insurance industry as it relates to General Aviation is totally different from the general liability insurance industry that you are familiar with in the United States. There are less than a dozen underwriters of aviation product liability insurance world wide. And over half of those are in Europe. There are less than a half dozen major reinsurers of aviation product liability insurance and they are all in Europe. It is a whole different industry complexion.

So you can not compare the situation in the general liability insurance industry with the aviation product liability insurance industry.

And finally, as has been pointed out, most of the manufacturers, or at least many, are self insured for all or a large portion of their own liability problem. That means that their problem obviously is not an insurance problem. It is a real cost problem.

As a result, the assertion that this is just an insurance problem, it is going to go away, I find to be unbelievable.

Finally, the trial lawyers will tell you, and I have seen it said many times, that this bill is going to remove the rights of the poor innocent victims, and that all the manufacturers really want is to restrict the right of these victims to recovery and make it more difficult for them to get money that they justly deserve.

That is just not true. I run a manufacturing company, and I know most of the people who run manufacturing companies in our business. I can tell you for certain that all of us are totally willing to compensate the victim of an accident if it was our product that caused the accident. I think all we are looking for in this legislation is a way to tighten the rules associated with litigation as it relates to General Aviation so that we do not have the frivolous suits and the unethical practices that we see over and over again and therefore make the system more predictable.

The trial lawyers will tell you that they are just protecting the victims' rights by opposing this legislation. But I wonder if they are not really just protecting a system of laws that has gotten out of control and is working more to their advantage than to their disadvantage. In fact, whose interest do they really represent?

Last year there were over 15 million lawsuits filed in the United States. And over the last few years we have seen some awful crazy things occur in litigation and in trying to start litigation.

A woman who brings a lawsuit against a peanut butter manufacturer for the peanut butter manufacturer's failure to warn that the peanut butter can choke her child. A jury in the state of Texas which brings back a $9 million verdict in favor of four defendants who died in an airplane crash, $2 million of which was awarded for pre-impact fright. Now pre-impact fright, that is the fear that the people had in the airplane as the plane was on its way down.

A bevy of lawyers flocking to Bhopal after the chemical accident which looked like sharks in a feeding frenzy. And finally the disgusting behavior of an individual who poses as a priest in the recent airline crashes in Detroit and Denver, trying to get clients for plaintiffs' attorneys.

The problem is that the business of litigation has gotten too lucrative. It has brought out the worst in people and it has brought out the worst in trial lawyers. The worst elements of the legal profession are surfacing. Reputable attorneys are disgusted with this, and they are disgusted with this state of affairs.

Judges just will not control the courtrooms. Lawyers unfortunately are unable to control or regulate themselves. Plaintiffs attorneys for example sometimes bring suit where they do no homework before they bring the action. Plaintiff's attorneys conjure up cases where there is no case. Plaintiff's attorneys go for the deep pocket when in fact there is someone else at fault. And plaintiff's attorneys will extort settlements from innocent defendant's just to defend their lawsuits.

The fault is not all on the plaintiff's side. On the defendant's side, defense attorneys drag out lawsuits interminably, driving up the cost of litigation. Defense attorneys at times do not recognize the fault of their own clients and advise them to proceed. And defense attorneys do not advise their clients to seek alternate methods of dispute resolution other than litigation.

I just had something happen to me about three days ago which is a great example of what I am talking about. I was preparing remarks for this testimony today when I decided to take a break and read my mail. And in the mail was a nice fat envelope from an attorney in Hawaii. Just regular mail, so I am usually the one who opens these things up. I open the letter and in it I found no correspondence, instead I found service, or what alleges to be service of a cross-complaint in a lawsuit, and an answer to a complaint. Now this is not the original lawsuit. This is somebody's answer to a lawsuit. So I have gotten fairly good at reading these things over the years unfortunately. So I read through it and I found there is absolutely no reference to the alleged airplane accident, and there is no reference to what happened relative to our product's involvement.

In fact, as I mentioned, this is not the suit. This is a cross-complaint in a suit that has been brought. And I looked down through the names of the people who are named in the suit, and I found that there is the estate of someone who has died apparently in an airplane crash bringing suit against Cessna Aircraft Company, a host of other people, a lot of John Does, and lo and behold in the middle of this thing is our name. Our company is apparently being sued and we did not know about it. In fact we did not even know that the accident occurred.

So for the last three days, I, and all of the senior management of my company have been calling the FAA, the NTSB, and our insurers. We have engaged an attorney in the state of Hawaii to find out what this is about. And do you know what we found out? We found out that this suit relates to an accident where an individual was flying an airplane toward Honolulu from the west. As he was flying, he radioed control in Honolulu that he was having an engine problem and that he had lost rpm in his engine and that he was losing altitude.

That was the last transmission from the airplane. The controllers in Hawaii got a fix on his position, so they sent out the Coast Guard to look for the airplane. In two days of searching the Coast Guard could not come up with the wreckage or the body. Now just think about that, to this date, and that happened almost two years ago, there has been no body found, no wreckage found and yet there is litigation being brought against ourselves and a whole group of manufacturers. And let me tell you, by the time this thing is done, there could be several hundred thousand dollars in legal fees expended. And what is the evidence? A radio transmission that somebody went down.

For all we know, this guy could have ditched his plane, his wife, and be on the beach somewhere in Tahiti having a great time. But in the meantime, we are all left holding the bag.

This is the kind of thing, the kind of practice that I am talking about. And this is a good example of the reason why we need to do something about this situation. And the sad part is, in these kinds of litigation, after all of the money is spent, only about a third of it actually goes to the victim. The rest goes into the legal system paying the attorneys and paying the courts.

So the question is, "What can we do about this situation?" We can not change the judges, very tough to change their actions. We can not get the lawyers to regulate themselves, they have not done it yet. We have to fix the system the way they are going to attempt to fix the situation in the National Hockey League. And that is, if you can not get the players to change their behavior, if you can not get the refs to change their behavior, then you have got to change the rules.

What I am suggesting that what is necessary in this case is a tightening of the rules, a restriction of the rules so that this kind of thing does not occur anymore. And you can take a step forward today, and in your discussions after this testimony is over in getting this in place and fixing the system by passing the bill that has been introduced by Senator Kassenbaum.

Thank you very much.

[The statement follows:]

STATEMENT OF FREDERICK B. SONTAG PRESIDENT UNISON INDUSTRIES, INC.

My name is Rick Sontag. I am President of Unison Industries in Rockford, Illinois. We employ 100 people in the manufacture of magnetos and other ignition components for small piston engine airplanes. Magnetos supply the spark to run the engine of the plane. Chances are if you have flown in a small airplane, your plane's engine was kept running by our products.

I am also Chairman of the Product Liability Committee of the General Aviation Manufacturers Association (GAMA) which represents manufacturers of airframes, engines, avionics and other components. Collectively the membership accounts for over 95 percent of the general aviation equipment manufactured in the United States today.

General Aviation is not just the few private planes of the rich and famous. Instead, general aviation plays a significant role in interstate commerce. It comprises an active fleet of 215,000 airplanes and services some 16,000 airports. This is compared to only 4,600 commercial carrier aircraft which service 850 airports. General aviation flies 36 million hours annually - four times the hours flown by the airlines. In addition to the personal and business transportation role that general aviation plays, it also provides air ambulance services, aerial surveillance, law enforcement, overnight mail service, crop spraying and high speed jets for organ transplant missions. It also supplies nearly all of the aircraft used for basic pilot training throughout the world. It is in fact the backbone of our air transportation system.

Just a few years ago the United States general aviation industry was clearly the world leader. Today, that status is eroding rapidly. One of the key contributing factors is the continuing product liability crisis in general aviation.

In 1979 our industry delivered nearly 18,000 aircraft. In 1986, the industry sold less than 1,500 planes. This year the number will be even lower.

In the past, piston aircraft sales—the familiar Beechcraft, Pipers, and Cessnas—have historically accounted for 90 percent of all units produced. Today, Cessna no longer manufacturers any and Beechcraft and Piper produce only a few piston planes. No training aircraft are being manufactured at all in the United States, and industry employment is down nearly 70 percent. A once thriving industry is in danger of being lost forever.

A number of factors contributed to this decline, but many of these elements such as high interest rates and overall economic recession have disappeared. The one factor that persists and continues to worsen is our industry's product liability cost. As you will note on the chart that I have attached, paid claims for judgements, settlements and defense accounted to $24 million on industry revenues of $1.4 billion in 1977. In 1985, it skyrocketed to $210 million on approximately the same revenues. These costs have grown despite the fact that the general aviation accident rate has shown steady improvement since 1946.

It has often been said that the insurance industry is responsible for the product liability crisis. Losses due to poor judgements by insurance companies a few years ago, it is claimed, are being made up for by exorbitant recent rate increases. Some people even believe that the product liability insurance crisis is over. Whatever may be the case with other industries, it is not true for general aviation.

The sharp increases in insurance premiums have been driven primarily by huge judgements, settlements and defense costs. In 1981 only five percent of the dollars paid by insurance companies were for settlements in excess of $1 million. By 1985, 30 percent of the dollars were for awards or settlements in excess of $1 million.

As a result of the risk, most insurance underwriters will not write aircraft product liability policies at any level of premium. So today, there are less than a dozen major underwriters of aircraft product liability insurance worldwide and most of those insurers are located outside of the United States.

And the availability of insurance coverage for general aviation from these remaining carriers is rapidly disappearing. As a result, several general aviation manufacturers are completely self insured, some up to levels of $100 million.

The insurance cost problem cannot be fixed through repeal of the McCarren-Ferguson Act since aircraft product liability insurance is already exempt from its provisions. And any other legislative attempt to regulate the insurance premiums in aircraft product liability would have little effect on an industry which is heavily controlled by companies with no U.S. presence.

As the president of a small company who becomes personally involved in product liability cases, I can tell you that the main cause of the product liability crisis is not the insurance industry but rather the way that the product liability law has become twisted and abused.

Let me give you some examples of what I am talking about and the effects the problem has had on our company.

Take, for example, a 1977 Chicago incident involving 3 young men who crashed their airplane shortly after reporting engine difficulties. The plane struck an industrial building, killing one of the men, seriously injuring the others, and destroying the building. We and 17 other companies who manufactured components for the airplane were each sued for $23 million.

In four years of investigative work by the plaintiffs, the FAA, and the NTSB, it was clearly shown that our product had absolutely nothing to do with the accident. In fact, the plaintiffs' attorney told us privately that he had no case against us. Nevertheless, he refused to let us out of the lawsuit for over four years. He finally let us "buy our way out" by paying him $63,000 as a settlement. By then we owed our own attorneys over $55,000—a big bill for a small company. And a high price to pay for having no fault other than supplying a component for a plane that crashed.

In 1980, a young part-time employee of an aircraft training and maintenance facility mistakenly allowed a student pilot and his instructor to fly an airplane which was not supposed to be flown. The plane had had magneto problems and had not yet been serviced. On the first takeoff, the plane crashed, killing the student and instructor. Due to the crash as well as years of similar operating problems the City of New York closed down the training and maintenance facility.

Our company was sued for $20 million in "lost profits" by the maintenance facility, who alleged that our magnetos caused the crash which caused the company's demise. They also sued the City of New York and many others. Ultimately there were six different lawsuits and nine law firms involved. Using the plane with the magneto problems was clearly the responsibility of the maintenance facility. Nevertheless, our company eventually paid $10,000 for our dismissal from the suits after four years and $46,000 in attorney's bills.

In another case in 1985 we were sued by a Kansas man for a 1983 injury he sustained while turning his plane's propeller by hand. After $5,000 in attorney's fees and two months' investigation, it turned out that he had our competitor's magnetos on his airplane—not ours! In the one year since the accident, he hadn't even taken the time to read the labels on the magnetos before he sued. And his attorney added insult to injury by not agreeing to dismiss us from the suit voluntarily unless we agreed not to sue him for his mistake.

Unfortunately, these kinds of abuses are commonplace in aviation product liability litigation because emotions and potential jury awards run extremely high when it comes to airplane accidents.

The impact of this litigation and threatened litigation on our company has been severe. As we have pointed out, the general aviation market is severely depressed, due in large part to product liability. Because of the drop in our business, our company employs less than 50 percent of the people we had in 1979.

We have also had other financial effects from the product liability crisis. For example, our product liability insurance cost recently escalated from $109,000 to $250,000 in one year. This in spite of our having the best year in the last several years for product liability claims and damage payments. We cannot pass this premium increase on totally to our customers, and so our operating budget had to be reduced. Our employees ended up paying for it!

The product liability problem has also stifled innovation at our company. A few years ago we scrapped an advanced electronic ignition project because we were afraid to pioneer such a liability risk. Today our company will only undertake technologically innovative aircraft product development if we have the sponsorship of a larger company. We cannot afford to take the liability risk alone.

Our product liability problem also makes it difficult to obtain suppliers, since most manufacturers will not take on the risk of making a product which goes on an airplane. In fact, due to the difficulty in obtaining suppliers, we have been forced to make most of our components ourselves—often at higher cost.

The effects on our own small company are the same felt by all companies throughout the industry. The impact has been to drive a vital segment of our economy nearly out of existence. Before 1981 general aviation contributed to our country's health with a strong positive trade balance. Today the general aviation trade balance is negative. And foreign manufacturers, many of whom are subsidized and do not have to insure the huge fleets of airplanes that old line producers—Cessna, Piper, and Beechcraft—do, are lining up in numbers to assualt our market even more vigorously.

And so the issue of product liability has become an issue of jobs, foreign trade and the competitiveness of the United States. We cannot let this industry slip away from us.

In my opinion, the only way to cure the product liability problem is to fix the system of laws which have allowed the abuses to occur. I believe S. 473 does this. It avoids changes in the most controversial issues such as damage caps and limitations on attorney's fees and focuses on the basic issues which are affecting our industry. And, as you will hear, it has the support of every major aviation consumer group affected by the bill.

As a small businessman I have sat by and watched many U.S. industries such as machine tools and semiconductors slip away when actions by our government may have helped prevent it. General aviation is an industry which can be helped with action right now. And so I urge you to act swiftly on S. 473 before the industry is lost.

Senator FORD. Mr. Martin.

STATEMENT OF ROBERT MARTIN, SENIOR PARTNER, MARTIN, PRINGLE, OLIVER, TRIPLETT & WALLACE

Mr. MARTIN. I would like to try to provide the committee with a little bit different insight into the problem that we have here.

When we testified earlier this year, before the House subcommittee on aviation, they asked some questions. And at the conclusion of the hearing, asked me if Beech had data on the real effect of the problem as it relates to Beech and would be able to provide them with some hard numbers, shall we say.

They suggested that we pick the most recent four year period for which we had figures. I told them that we did have the data and could develop the answers that they wanted. I went back to Wichita and we selected the four year period January 1, 1983 to December 31, 1986. And before I give you the numbers, let me say that Beech today represents approximately 20 percent of the industry in terms of sales, either in dollars or units sold. That is a little higher than it has been in the past.

To give you some idea of the proportions, the problem here is generated by the U.S. fleet of airplanes that have already been manufactured and are already out there. The real problem is that we have to add on enough to the cost of each airplane we make this year to pay for the liability exposure of those airplanes we have already made. Some of which by the way were designed back in the 1930's. Beech for example still has close to 2,000 airplanes that were designed prior to World War II out there flying.

In terms of fleet numbers, Beech has about 25,000 airplanes in the U.S. fleet. Cessna has about 100,000 airplanes in the U.S. fleet, and Piper has about 55,000. So in terms of units we are the smallest number. But let me tell you what this fleet has done for us over this four year period.

We went to our accident investigation and litigation files, and we pulled out all of the crashes that had generated a case, one or more cases that were pending during the four year period 1983 through 1986. That turned out to be 203 crashes. They probably generate an average of two cases a crash, or two or three, or maybe three claimants or four claimants a crash. We are just going to talk about per occurrence or per crashes and treat, if there's four litigations, we treat them as one.

We had 203 cases that generated a case that was pending during that period.

Senator FORD. Were these all fatal?

Mr. MARTIN. No, they were not all fatal. Some of them were fatal and some of them were serious injury. We excluded smaller cases below $100,000 claimed, that is property damage cases of minor amounts.

Now of those 203 cases, you know the Congress has created the NTSB to investigate transportation accidents. And I want to say that the NTSB does a good job. They are not adequately funded. They have some problems because of that. Very frequently manufacturers are asked to run tests by the NTSB because they don't have the funds to do it. I know Beech does it and I know Cessna does it and I am sure that the other manufacturers do it.

So we bear part of that cost burden. And that is included in these figures that I am going to give you. But they are doing a good job. They are knowledgable people and they know what they are about. They are on the scene immediately. Sometimes they have a whole team.

Let me tell you what the NTSB findings about these 203 crashes were. These are the assigned causes found by the NTSB: pilot or operator error, 118; design or manufacturer defects, zero. No finding among those 203 cases, or 203 occurrences did the NTSB find that there was a manufacturing or design defect which caused the crash. Maintenance, 22; weather, 21; air traffic control, one; other causes than those I have named, one; undetermined, 15; not known or unavailable, 48. And most of those are accounted for by the fact that the NTSB, you see this runs up to December 31, 1986, so in most of those cases there has not been a final determination of what the probable cause is.

But of the 203 cases that you have here, none were found to involve a manufacturing defect.

Let's look at the effect of those cases on Beech. First of all, there was an average of three people on board. If you take the owner-operator and his employees, that is the guy who owns the airplane and operates it, or his pilot, or his direct employees, you account for almost 50 percent of the people on board.

Guess a count for 262 out of the 599 people that were on board those 203 airplanes. The number of paying passengers is only 80. So what you have here is a situation in which almost more than 40 percent of the people that we injured or killed were the owners of the airplanes, and usually the owner-pilot of the airplane.

That just gives you a statistical background of who the plaintiffs are. Now you know, most of the people who fly around in our airplanes, whether they be the owner and pilot or his guests, are not in straightened circumstances. They are usually reasonably wealthy people. And we are not protecting the poor here.

Let me give you some numbers about the consequences of these 203 crashes that generated lawsuits.

The average claim that arose out of one of these crashes was $10 million in round figures. That is, each one of these lawsuits had a $10 million price tag on it. The average per fatality or serious injury is $3.7 million.

What our figures show us is that each one of these lawsuits, before we get through with it, is going to cost us $530,000 to handle whether we settle it, whether we try it, whether we win it or whether we lose it, the average cost is half a million dollars.

I am sure that is true of Cessna and I am sure that is true of Piper. Approximately, it depends on what year you are talking about, 40 to 50 percent of those cost outlays are for defense costs.

Senator FORD. This is just administrative costs, court costs, et cetera?

Mr. MARTIN. Well, it is more than that. It is the fees you pay your lawyers to defend the case.

Senator FORD. I am talking about legal fees. What percentage of the cost is the legal fee?

Mr. MARTIN. I would guess—I do not have that isolated from court costs, expert witness fees, and travel costs and that sort of thing—but I would say it exceeds a third, is direct lawyers' outlay.

Now, you have to realize that in a case in which there is a judgment or there is a settlement, we are only paying one side of those legal fees. There is a whole other side.

Mr. Sontag made the observation that less than a third of the total amount that we put into the system ever gets into the hands of a victim.

According to our numbers, and this is a different research that we did back in the late 1970s, that is an overstatement. The precise amount that gets into the hands, or got into the hands of an injured victim in Beech crashes up to that point was less than 20 percent. Eighty percent of that cost is ground up in the legal system.

What I want to get across to you is, these are high cost cases. They are very attractive cases.

As you can tell from the numbers I have given you, they are $10 million claimed. They do not recover that, but it is still out there. And a half million dollars cost every time one of those is filed.

Now, we are winning over 80 percent of our cases. But that does not really help us all that much when each one of those cases is costing us half a million dollars.

Now let me give you the actual cost outlays by Beech to handle its product liability exposure in that save four-year period.

Beech is self-insured at present, in 1987, for the first $50 million of annual aggregate loss. In 1986, we were uninsured for the first $30 million of annual aggregate loss, that is, all of the losses and defense expenses, Beech paid up to a total of $30 million a year in 1986.

So while there is an insurance component here, this is not really an insurance problem. It has gotten to be that the industry is under such attack that the insurers will not touch the liability down below certain limits.

Cessna is self-insured for a $100 million. Piper is totally self-insured. Several of the engine manufacturers are self-insured for the first $100 million.

So the first problem is a direct outlay by those manufacturers. In our case, if you go back to 1983, we were able to buy insurance coverage in the world market down to $4 million annual aggregate.

We spent that $4 million and we paid premiums for coverage above that in the amount of $6 million. I am incorrect in that; we paid premiums for the coverage above $4 million of $2.2 million in round figures.

So we had a total cost or total outlay in 1983 of $6.2 million in round numbers.

In 1984, we were uninsured for the first $5 million, and our cost for excess coverage had risen by a million dollars. So we laid out $8 million in 1984.

But in 1985, the situation, as this chart would demonstrate, got radically worse. Starting in 1985, we were uninsured for the first $10 million, and we paid another $9.5 million for insurance coverage above that.

So we got into the big dollars in that year. And in 1986, as I have already told you, we were uninsured for the first $30 million, and we paid $10,700,000 for insurance above that; so our cost was $23 million for product liability coverage.

We have about the same cost in the current year.

Now on top of those costs, we pay about $1.5 million for accident investigations a year, and we probably do testing for the NTSB and the FAA so they can determine what happened in some of these accidents of probably at least another half a million to a million dollars.

So our outlays are running now about $25 million a year. Now, we cannot support that on the sales that we are making, on the airplanes we can build and sell. We just cannot do it.

We are defending cases involving airplanes that were built 20 years ago, 25 years ago, sometimes airplanes that were built during World War II as military airplanes that have gone into the civilian service.

No industry can support these kind of claims and these kind of expenses on the revenues that we are able to generate.

Now I want to digress from these numbers for a minute to give you another statistic. Last year Beech ran an experiment. You are going to hear I think later on, and I will address it in a minute, a lot about the Bonanza airplane. The Bonanza airplane is an airplane that was first designed and built by Beech in 1946.

It was one of the first, perhaps the first, of the fast high performance single engine airplanes. It is a very popular airplane, over the years. We are still building those airplanes, and they are not the same airplane; they are improved and they are changed.

But over the years we have built and sold over 10,000 of those airplanes. The sales were down to virtually zero because of the cost, an airplane which when I first flew it in 1949 cost $8,000 to buy new, today costs over $200,000.

It is a better airplane, it is a more expensive airplane, and there are inflation factors that have changed that price. But at that price, as we calculate it on a unit basis, almost 50 percent of it is the product liability exposure.

In other words, if we did not have these costs we could build those airplanes and sell them for about half that price.

Last year, Beech determined to find out if indeed its airplanes were price sensitive, if that is why we could not sell them.

We were selling less than one Bonanza a month. We dropped the price by 20 percent and we started selling Bonanza airplanes.

Now we had to quit it, because we were losing money. But the experiment tends to prove exactly what I am here to say. And I am sure it applies to other people's airplanes. You cannot sell them at this price.

And the biggest single component in this price is the liability exposure.

Now there are two other points I want to make. The question was asked here if the liability laws—I think of Congressman Glickman—if the liability laws of the United States apply to airplanes manufactured by foreign manufacturers, and he gave the correct answer, which is yes, they do.

But the impact in terms of cost is not the same because the foreign manufacturers, whether they be French, British, Japanese, or whoever, do not have a fleet of U.S. airplanes out here to support with their new ones.

And they do not have the loss history that the manufacturers in the U.S. industry are pillaged with. They have not been in this business as long.

Now, if they keep on selling airplanes at the rate they are selling them, because we cannot manufacture them and sell them, they will of course eventually build up a fleet. But that is going to be 30 years from now before they get up to the same numbers we have, and before their costs begin to approach ours.

And I think before that time, they will begin to deal with that.

There is another problem that perhaps plaintiffs lawyers have not thought about, and that is, that they should try and conduct discovery abroad. They are going to find it is a whole different ballgame, and that is where our whole big expense is, deposition after deposition, thousands of documents that you produce in each one of these cases, that drag on for years and years.

The foreign manufacturers and their governments are not going to tolerate that. Whether they do or not, that is off in the future, and by that time this industry, as a U.S. industry, will be dead.

We will be making nothing but military products and high performance corporate airplanes, probably of the turbine category. The piston-driven airplane, the small general aviation airplane that you see in the sky all the time, we will not be making those, because we cannot sell them at this price.

Before I close, I think that when Mr. Hogan testifies, and I will not have a chance to rebut him, you are going to hear about a case that he tried involving a Bonanza airplane.

And the fact that Beech has made a modification to some but not all of those airplanes in order to bring them in line with FAA requirements of 150 percent margin over normally expected loads, lest you be left with the impression that Mr. Hogan's case had something to do with Beech's investigation of that airplane, Beech's testing of that airplane, and Beech's effort to fix those models, which needed some change, I want to communicate to you that before Mr. Hogan tried his case, Beech had undertaken an investigation of that airplane—not the first one by the way, but about the fourth one—and Beech had agreed with the FAA that Beech would bear the cost of a very elaborate testing program to try to find out what was going on with the tail of that airplane.

We spent about $2.5 million on that test program, because while it was the FAA's test program, we willingly supported that. We had agreed to support it, we agreed to bear the cost because the FAA didn't have the money.

We ran the test program. We did the analysis. We turned it over to the FAA. We jointly analyzed it, and we agreed upon a fix consisting of a cuff at the root of the tail section as to some models but not all.

And that was all in progress long before Mr. Hogan tried his case. And the result would have been the same whether he had tried his case or whether he hadn't, and whether he had won it, which he did, or lost it.

I will also report to you that we do not have any cases pending at this date. We did not have very many pending when Mr. Hogan tried his case.

I am not going to tell you that there was not something wrong with some models of that airplane. But I am going to say to you that the alleged deficiency involved whether or not the airplane could be held together after it had been allowed to go out of control.

Every airplane has an operating envelope. Every airplane has a never exceed speed. And if you get the airplane beyond that speed, at some speed above that it is going to come apart. It cannot stand the forces.

That is true of every airplane you fly. This airplane did not quite meet those margins when the airplane was in a bizarre unusual operating situation. We have fixed that, and we fixed it at our expense, and it was our engineers, along with the FAA, who designed the program, and it was in place and running long before Mr. Hogan showed up on the scene.

I do not want to deny him his victory, but I do want to say to you that it had nothing to do with the fact that we either ran the investigation or fixed the airplanes.

That is not the first investigation that Beech has run or Cessna has run or Piper has run on an old airplane or a new airplane, and it is not the first time we have gone out and fixed them.

This chart demonstrates not just the rising costs, but that black line tells you this: product liability exposure in the aviation business was not a factor until 1968. I mean, the number of cases pending was minimal, and the expense was minimal.

From 1968 on, it kept on growing, and it is still growing. But look at that decline in the accident rate per 100,000 hours flown.

The court system has not brought about improvements in the safety of aviation. They were in place and functioning with a constantly declining accident rate from 1946 on.

We do not have figures behind that, what the picture was behind that I cannot really tell you. But from 1946 on, from the end of World War II on, the industry has been consistently improving its products, just as swiftly, without the intervention of the courts or the plaintiffs' bar.

I am a lawyer. I have been trying lawsuits. This is my 40th year as a practicing lawyer. I respect lawyers. And I think they perform a service.

But our profession, and the courts that administer it, have allowed this situation to get out of hand. And the fact is, we are liquidating one of our industries through the courthouse doors, principally because these cases make very attractive cases.

And the numbers that I have given you reveal that some constraints have to be placed on a circumstance.

Let me give you one other set of numbers, and then I will close. I did a calculation—the question is frequently asked, if this legislation is passed, what will its impact be?

Well, some of this is estimation. But it is an estimation from a man who has been pretty close to this situation for 20 years.

I believe that within three to five years, this legislation should reduce the claims overload and the expense by about 50 percent. So it is still going to be high.

I think further improvement is going to take time. But I think that this litigation over 10 years will probably bring it back under control.

But it will have a dramatic effect within three to five years, and let me give you one of the reasons why I think that is correct.

Number one, if you had a 12 year statute of repose, if you look at these 203 cases, by looking at the date of manufacture and the date of the crash, we know that 40 percent of the cases would have been outlawed by a 12-year statute.

If we had a 15-year statute of repose, 34 percent of the cases would have been outlawed.

If you had an 18-year statute, 24 percent of the cases would have been barred.

And the statute of repose is an important part of getting a balance between the domestic industry and the foreign industry.

But there are other aspects of this law that will also make it less attractive to speculate in this kind of case. And therefore—and that is what I take into account when I say that I believe that within three to five years we will have a 50 percent reduction.

We could do better than that, because all of us are having to pay high costs for excess insurance coverage, because anyone of these cases can generate an enormous verdict.

And the insurers can look in our files, too, if they are going to insure us. And they know that we have Bonanza crashes out here with claims of $150 million, with two people on board.

And most of these insurers are foreign insurers. And as one of them said to me, he said, you know, we are perfectly willing to underwrite the risks of your products. We think you make good products, and we think you are safety oriented.

But we are not willing to underwrite the risk of your crazy legal system. Those are his words, not mine. But that is exactly what he said.

And that is what we are paying for. And we have to have the insurance. We cannot bet the company ever year.

So we carry insurance up to $500 million so that we at least have our tools and dies and our factory in place if we have to pay a $50 million judgment.

Except for answering your questions, I believe that is the best picture I can get to you of what the industry is facing at this time. We desperately need this legislation. We desperately need some legislative help or we are going to be gone.

And on the balance of payments, historically, Beech has exported a third of its products. We are now down to about 20 percent for the same reason: Our products are overpriced.k

Thank you.

[The statement and questions and answers follow:]

STATEMENT OF ROBERT MARTIN, MARTIN, PRINGLE, OLIVER, TRIPLETT AND WALLACE

My name is Robert Martin. I am the senior partner in the law firm of Martin, Pringle, Oliver, Triplett and Wallace, Wichita, Kansas. Our law firm serves as general counsel for Beech Aircraft Corporation. Beech has been producing business aircraft since 1932 and during the last 55 years has produced nearly 50,000 aircraft. For the past 17 years, our law firm has had primary responsibility for all product liability claims and litigations asserted against Beech Aircraft Corporation. I am here to testify in support of S. 473, the General Aviation Liability Standards Act.

In an effort to better manage the product liability problems of Beech, both the company and our firm have collected and studied the data available on the product liability problems of the entire general aviation industry. For the past decade, it has been my opinion, shared by the management of Beech, that the general aviation industry has been approaching a crisis in terms of its ability to cope with the cost burden of product liability exposure. I believe that crisis is now at hand and literally threatens to destroy the industry and frustrate the national purpose expressed in the federal acts regulating the aviation industry and promoting aviation as an essential part of the national air transportation system.

Today GAMA estimates that about 1,000 new aircraft will be manufactured and sold during 1987—down over 90 percent from a few years aoo.. It is important to note that despite the general economic recovery that has been in progress now for some time, the trend in the unit sales of general aviation airplanes has continued its downward spiral, in large part because product liability costs have greatly increased the price of our product.

The following Beech figures will demonstrate the escalation of this problem over the past three-and-one-half years:

On January 1, 1984, Beech was faced with product liability lawsuits asserting total claims for $447 million. This claims overhang increased rather steadily throughout 1984, 1985 and 1986. Last year product liability claims pending against Beech topped $1.1 billion. My company represents approximately 15 percent of the industry and the Beech figures suggest that the total claims overhang for the industry is more than several billion dollars which far exceeds the most optimistic sales estimates for the entire industry this year.

In 1986 Beech sold about 300 airplanes in the world marketplace. Our 1986 costs for insurance were about $24 million. Each unit Beech sold last year had to bear—on average—$80,000 in insurance costs.

The figures I quote are actually an understatement of the product liability cost the general aviation manufacturing industry faces. We know that the vendors of systems, components and parts which we purchase and include in the finished aircraft, collectively pay insurance premiums equal to at least 25 percent of the insurance burden imposed upon aircraft manufacturers. The end result is that for Beech sales in 1986 there was an average premium cost of some $105,000 per unit.

The consequences of the decline in aircraft sales for us and for the industry are severe and widespread. The following are examples:

—In 1980, Beech employed a total of 7,600 persons in its principal manufacturing facility at Wichita, Kansas. Current employment in our Wichita plant is 4,900.

—1980, Beech operated manufacturing facilities in Salina, Liberal, Wichita and Newton, Kansas; Boulder and Longmont, Colorado; and Selma, Alabama. The Beech plants in Liberal, Newton, Longmont and Boulder have been closed; manufacturing operations in Selma, Salina and Wichita have been reduced.

—In 1980, Beech manufactured several models of light single-engine trainer and owner-flown airplanes, as well as light-twin aircraft at our Liberal, Kansas, plant. With the closing of that facility, the production of these models was suspended, with no short-term plans to resume their manufacture. The reason is quite simple: before the current product liability crisis, the selling price of those small single-engine, owner-flown airplanes was less than the average per unit product liability cost we face today.

—During the past several years, we have lost, with increasing frequency, suppliers of parts, components and systems essential to the manufacture of finished airplanes. In Beech's case, some 100 suppliers are no longer doing business with us. Increasingly, small manufacturers are unable to purchase insurance coverage and they elect either to cease business or eliminate aviation products from their operations. Larger suppliers who can obtain insurance coverage find that the cost of product liability insurance for aviation products is disproportionate to their insurance costs for other products, such as automotive components and parts, sometimes by a factor of several hundred percent. As a result, they are dropping aviation parts and components from their product lines.

—In many instances, alternate sources are not available from domestic manufacturers and we are confronted with the choice of purchasing imported manufactured goods or producing the products in-house, at a much increased cost. Mr. Chairman, because of this development we are now actually exporting our technology to foreign nations eager to develop their own general aviation manufacturing capability.

The extent of federal regulation on this industry is unique in its coverage. The builders, operators and maintainers of a general aviation aircraft are bound by government rules throughout the life of the airplane. The rules impose restrictions, inspections and significant costs—all in the interest of standardization and safety. They are indeed justified. They have provided for a safe, orderly, well-disiplined air transportation system. The aviation tort system, which is used for accident litigation under 50 differing bodies of state law, desperately needs the same kind of uniformity. A federal statute, such as contained in S. 473, would fulfill that need and is indeed justified.

Beech Aircraft has studied the product liability exposure situation intensely. A detailed statistical analysis performed in 1978 reveals that the product liability tort litigation system is dreadfully inefficient. Of the money spent by aviation manufacturers to insure and defend their products, 80 percent was consumed within the system; stated another way, for each dollar spent by manufacturers in insuring and defending their products, less than 20 cents ever reached the hands of someone injured or the survivors of a person killed in a general aviation accident.

The survivors of persons killed or persons injured as the result of poorly designed or manufactured products should not be without a remedy and no one suggests that they should. But to maintain a system as unmanageable and inefficient as the product liability tort system has proved to be is an extravagance that neither the industry nor the nation can now afford. The present system, which permits and even encourages unrestrained, unjustified and costly litigation, produces exorbitant awards for a few, inadequate awards for some and no awards at all for many deserving victims who are truly innocent of any negligence or wrongdoing. This is unfair, but it is equally unfair that a large number of people have lost good jobs as the result of this extravagant approach to a reparations system which has been largely devised and is controlled by courts, lawyers and insurers.

S. 473 does not offer a perfect solution. There is no guarantee that with its enactment the industry's product liability problems would quickly disappear. But I am sure that some legislative action is absolutely necessary to arrest the runaway liability costs plaguing the industry. This bill is fair to consumers and manufacturers alike. It imposes no caps nor constraints on existing compensation systems. It enjoys a significant degree of support within the Congress. We urge this committee's prompt, resolute action to help salvage a dying domestic industry by favorably reporting this bill.

Mr. Chairman, should the committee wish to review some actual cases which reflect the inequities in today's tort system, I would be happy to provide them for the record or discuss them with you.

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January 5, 1988

Via Federal Express

Hon. Ernest F. Hollings
United States Senate
Committee on Commerce, Science,
and Transportation
125 Russell Senate Office Building
Washington, D.C. 20510-6125

Re: S. 473, General Aviation Liability Standards Act

Dear Senator:

I was out of the city on vacation with my family between Christmas and New Year, hence the delay in responding to the three questions forwarded with your letter of December 21st:

1. Comparative Fault/Responsibility and Limited Joint Liability. We are actually dealing with two distinct legal concepts. At present, all but a very few states have embraced the concept of comparative fault and juries are instructed to find the percentage contribution of fault for each party and, in most jurisdictions, even persons not joined in the litigation, commonly referred to as "empty chairs." I do not believe that a serious argument can be mounted against the concept of comparative fault. The problem comes with those states which have retained the law of joint liability, which is really a hold-over from the negligence/contributory negligence concept of the common law. Under the contributory negligence rule, the plaintiff had to be totally free of fault and if that was the proof, it was deemed not unreasonable to say that anyone who injured him or contributed to the injury of an innocent plaintiff could be required to pay the entire loss. Now, however, a plaintiff can be partially at fault, and in many jurisdictions principally at fault, and still recover the percentage of his loss or injury contributed by adverse parties.

If we are to require juries to find percentage fault, we have to accept that the system works; that the percentages found are a fair adjudication, but the application of the old rule of joint liability among defendants results in a situation in which defendants, but not plaintiffs, can be held responsible for the fault of another person.

It could be argued, I suppose, that while it is unfair to treat plaintiffs and defendants differently, the defendants as a class are more likely to be able to sustain the financial hardship which results from being required to pay losses attributable to the fault of someone else. I submit, however, that this analysis does not stand scrutiny when applied to general aviation for the following reasons:

a. People who fly, whether in general aviation airplanes or commercial aircraft, or both, can for reasonable premiums take out accident insurance, but the present circumstances are that insurance coverage is no longer readily available to those who manufacture general aviation airplanes.

b. Contrary to the situation with respect to the products of other industries, most people who fly in general aviation airplanes have substantial net worth and annual income. If this were not the case, they would be unable to afford that form of transportation. Stated another way, most people who use general aviation as a means of transportation are financially able to insure themselves or otherwise assume the risk of not being able to collect a personal injury judgment in full.

c. It has been our experience that most all owners and operators of general aviation airplanes are, in fact, reasonably well-insured against liability to third parties arising from the operation of the airplane they own.

d. A compelling argument is that we are not aware of a single case involving the crash of a general aviation airplane in which a plaintiff has been unable to recover the full amount of his judgment from the defendants found to be at fault and no such incident has been cited. In this connection, it is important to point out that approximately one-half of the U.S. jurisdictions do not follow the rule of joint liability attached to comparative fault and experience does not demonstrate any difference between the collectibility of judgments as between those states which do and do not apply joint liability to comparative fault judgments.

e. There is another factor at work in general aviation which, again, is not the situation with respect to the products of many other industries. As the result of statistical studies performed by Beech Aircraft this fall at the request of Chairman Mineta and his subcommittee, we were able to determine that of the persons on board Beech airplanes which crashed and resulted in claims or litigations over a four-year period, 43% were the owners and operators of the airplane or their direct employees; another 44% were guests (non-paying passengers), and only 13% were paying passengers. The implication of these figures is simply that most people aboard general aviation airplanes are there by choice, either as owner/operators or their guests and less than 15% can be classed as paying passengers who rely upon a commercial transportation service in the same way, for example, that airline passengers rely upon the manufacturers and operators in the commercial airline transportation industry.

f. Another compelling argument against joint liability attached to comparative fault is the promotion of air safety. If the owners and operators of general aviation airplanes and the maintenance and repair organizations know that they will be held responsible for their fault in general aviation accidents and are aware that they cannot lay it off on someone else, they will do a better job of flying and a better job of maintaining their airplanes. They will also probably do a better job of maintaining adequate insurance coverage. If it is true, as plaintiffs' lawyers argue, that imposing liability on manufacturers will cause them to make safer products, it is also true that imposing liability on pilots and owners and the facilities that maintain their airplanes will cause them to perform more carefully and more safely.

g. Finally, the joint and several liability scheme proposed by the general aviation industry is unique in that it makes manufacturers jointly liable for the parts, systems and subassemblies purchased from smaller companies and incorporated in the end product. This is not unfair because the manufacturer has the opportunity to estimate the financial responsibility of vendors and subcontractors and can refuse to do business with them if they are uninsured or of inadequate means, but the manufacturer has absolutely no control over the pilot, the owner of the airplane, or the repair stations which maintain it. The owner, on the other hand, does have the right to select a good repair or maintenance facility which is financially able to respond to its negligence. Similarly, the owner selects the pilot -- if he is not the pilot himself -- and in both cases can see to pilot proficiency.

2. Uniformity In The Law and Predictability Of Litigation Results. Again, we are dealing with two distinct concepts, which are best considered separately. Uniformity in the law will be accomplished by the proposed legislation. If the Act is passed, liability for general aviation accidents will be controlled by federal law which is set out in the Act. Regardless of the jurisdiction in which the litigation is brought and whether the case is tried in state courts or federal courts within that jurisdiction, the substantive law applied will be the same. When federal courts -- principally, Courts of Appeal -- have construed and applied the principal provisions of the Act, state and federal trial courts alike will be required to follow those decisions.

While there may be some novel interpretations by individual trial courts, that is not really the problem with which this industry is faced. We are struggling unsuccessfully with what amounts to 51 different sets of substantive laws. The federal regulatory scheme which covers design, manufacture, testing and certification of airplanes, the licensing of pilots and the management of air traffic have one set of standards. Each of the 50 states has a different standard as to what is a safe product, a safe operating procedure, and what is negligence or permissible conduct. Moreover, because airplanes generally move in interstate commerce and often cover great distances, there is almost always a number of jurisdictions in which any litigation arising from a crash can be brought. Under the present system, the cases tend to be concentrated in those states whose substantive laws discriminate most strongly against the manufacturer.

If this Act is adopted, the same substantive law will apply regardless of what jurisdiction the plaintiff chooses as his forum. We recognize that he may still choose a forum in which he believes individual judges and juries may lean most strongly in favor of the plaintiff or most strongly against the corporate manufacturer, but at least the substantive law playing field will be even and that is really the most important consideration in the experience of this industry.

There are other aspects of the American tort litigation system as it presently exists which severely impact general aviation and foreseeably would be greatly improved by uniformity in the substantive law as applied under the proposed legislation. These factors are:

a. Year-in, year-out, 40 to 50% of the total outlay by Beech for its product liability exposure consists of defense costs alone (lawyers' fees, expert witness' fees, special engineering work, costs of discovery and court costs).

b. We know from studies conducted by Beech as early as 1978 that of the total amount spent by defendants to underwrite their product liability exposure in the general aviation industry, after deducting defense costs, plaintiffs' attorneys' fees (contingent fees as a percentage of the award) and miscellaneous direct litigation costs, less than 20% of the dollars spent by defendants ever reach the hands of anyone killed or injured in a general aviation airplane. Studies conducted by other groups involving other tort litigation-sensitive areas place the transaction cost of the tort system at someplace between 70 and 80%. It is the inefficiency of the tort litigation system, particularly as applied to general aviation, with its high-dollar, high-tech cases, usually involving wealthy people with high earnings and verdict potential, which is burdening the industry.

c. It is noteworthy that of the cases litigated, it has been Beech's experience that it will prevail, by order or judgment, in about 80% of the cases, but the cost to win a single case often exceeds $1 million and on the average exceeds one-quarter-million dollars.

Because of the factors outlined above, uniformity in the law will, in our judgment, tend to reduce the number of cases filed which fall into the category of cases which never should have been brought at all. Beech and the rest of the general aviation industry can afford to pay adequate compensation to persons killed or injured in crashes actually caused by poor design or malfunction of the airplanes, but on the average that is less than 20% of the total outlay. What we cannot afford is the cost of defending unmeritorious cases. If the substantive law were uniform and stable and as proposed in the pending legislation, we believe that the number of speculative, unmeritorious cases would be substantially reduced and this is precisely the objective of the legislation.

In response to inquiries from members of Chairman Mineta's House subcommittee considering similar legislation, Beech performed a statistical study based on a database period for the most recent four-year period, i.e., January 1, 1983 through December 31, 1986. Within that four-year period, we examined all Beech claims and litigation files and accident investigation files for every claim or litigation which was brought or pending during all or any part of the four-year period. The data from these files has been accounted for on an "occurrence basis," that is, one accident is treated as a single occurrence, even if it resulted in multiple and separate claims or suits.

The results of this statistical analysis are interesting and, in my view, support the position of the industry that the tort litigation system imposes special hardships on general aviation. I attach to this letter a copy of the Beech statistical data furnished to Chairman Mineta's subcommittee and I call your special attention to the following data:

Over the four-year period, the average dollar value of plaintiffs' claims for each accident was almost $10 million, and the average cost to Beech to dispose of each litigation was over one-half million dollars. Perhaps most revealing, however, is the probable cause findings for those same accidents resulting from the Beech investigation and the NTSB/FAA investigations. Please note that the Government found no design or manufacturing defects and Beech found only two, as compared with the total of 203 occurrence claims and cases arising out of the same accidents.

3. Insurance Information. Following the earlier hearing before Chairman Mineta's subcommittee, we received inquiries for information regarding the insurance coverage held by Beech Aircraft Corporation, including that coverage supplied by the Travel Air Insurance Companies, which are subsidiaries of Beech, started up in 1972 to cope with the growing threat of product liability exposure. I also attach a copy of the information we have supplied to Chairman Mineta and his committee. I believe this document contains all of the information necessary to respond to your inquiry.

As to other manufacturers in this industry, it is my understanding that, at present, Cessna is uninsured for all losses and defense expenses below $100 million annually; Piper Aircraft presently has no insurance coverage for product liability exposure; and several of the power plant and component manufacturers are uninsured at various levels below $100 million annual aggregate loss and expense.

To the foregoing I would like to add that one of the aspects of the current situation which troubles me is the fact that small manufacturers of aviation systems and components frequently find themselves unable to obtain insurance coverage, with the result that the final assembler, such as Beech, is compelled either to make the product in its own factory, if it can, or buy the product from a foreign supplier. It is also true that young engineers who have demonstrated the ability to develop new designs of aircraft, systems or components are unable to start up in business because they cannot obtain insurance coverage for any new aviation design or manufacturing activity and they cannot raise capital or borrow money without insurance. In my judgment, this is the single, most important reason for the opinion which I hold -- shared by others -- that the general aviation industry and its technology are being driven offshore.

I trust the information supplied responds fully to your questions. If not, I will do my best to supplement it. We are attempting to answer questions asked by the Senate and the House with the best information available, although some of it is sensitive. To the extent possible, we would appreciate it if the distribution of data, particularly that related to the enormous claims overhang and the recurring cost of litigation, could be limited to Senators and the committee staff.

Yours very truly,

Robert Martin
MARTIN, PRINGLE, OLIVER,
WALLACE & SWARTZ

RM:cj
Enclosures

CLAIMS AND LITIGATION DATA SUMMARY FOR THE 4-YEAR PERIOD JANUARY 1, 1983 THROUGH DECEMBER 31, 1986

Total number of occurrence/claims and litigation files (the number of accidents included within this data base):	203
Total occupants on board:	599
Average occupancy (total occupants divided by the number of crashes in data base):	2.95
Total fatalities:	440
Fatalities per occurrence (total divided by data base):	2.17
Total serious injuries:	95
Serious injuries per occurrence (total divided by data base):	0.47
Total owner/operator persons on board:	230
Owner/operator persons per occurrence (total divided by data base):	1.13
Total passenger employees of owner:	20
Passenger employees of owner per occurrence (total divided by data base):	0.099
Total non-paying passengers:	262
Non-paying passengers per occurrence (total divided by data base):	1.29
Total paying passengers:	80
Paying passengers per occurrence (total divided by data base):	0.39
Total ground victims:	21*
Ground victims per occurrence (total divided by data base):	0.103
Total mid-air crash victims (in other aircraft):	4
Mid-air crash victims per occurrence (total divided by data base):	.02
Average dollar value of plaintiffs' claims per accident:	$ 9,860,000.00
Average dollar value of plaintiffs' claims per fatality or serious injury:	$ 3,740,000.00

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* 20 ground victims are accounted for by one accident--a Beech Baron penetrated the roof of a shopping mall on an instrument landing attempt in fog. This accident occurred during the 1985 Christmas shopping season. 4 persons in the shopping mall were killed and 17 received serious injuries. In one other accident accounted for in the 4-year period, a ground handler was killed by a prop strike.

Average cost per accident to Beech for loss and defense expenses (paid losses, defense expenses and booked reserves for losses and defense expenses):	$ 530,000.00
Probable cause per Beech accident investigation:*	
Pilot or operator error:	133
Design or manufacturing defect:	2
Maintenance:	18
Weather:	27
Air traffic control:	0
Other:	3
Undetermined:	8
Unknown/Not available:	34
Probable cause per NTSB/FAA investigation*:	
Pilot or operator error:	118
Design or manufacturing defect:	0
Maintenance:	22
Weather:	21
Air traffic control:	1
Other:	1
Undetermined:	15
Unknown/Not available:	48
Number of occurrence claims which would have been eliminated by a 12-year statute of repose (occurrences involving aircraft manufactured/delivered more than 12 years before accident date):	82
% of occurrence/claims eliminated (12 years):	40.4%
Number of occurrence claims which would have been eliminated by a 15-year statute of repose:	69
% of occurrence/claims eliminated (15 years):	34%
Number of occurrence claims which would have been eliminated by an 18-year statute of repose:	49
% of occurrence/claims eliminated (18 years):	24.1%

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* If more than one probable cause was assigned for a single accident, all were tabulated.

Self-Insured and Excess Premium Cost Data
For the Base Period
January 1, 1983 through December 31, 1986

Since 1971, Beech Aircraft Corporation has maintained a captive insurance company which underwrites the primary layer of coverage below which the insurance industry is unwilling to extend coverage. So far as we are aware, Beech is the only general aviation manufacturer which manages its self-insured exposure through a subsidiary and for U.S. tax purposes, Beech has been treated as a self-insurer, just as other manufacturers in the industry are treated who are, in fact, self-insurers. Therefore, the primary coverage provided by Travel Air Insurance Company, the wholly-owned subsidiary of Beech, will be treated for purposes of this analysis as self-insurance.

A suggestion has been made by a representative of the American Trial Lawyers Association, during testimony before the Senate subcommittee considering this legislation, that the Beech captives--Travel Air Insurance Companies--are highly profitable enterprises through which Beech is exaggerating the cost of its product liability exposure. Travel Air Insurance Company, Ltd. was organized in early 1972 as an offshore "captive company," whose primary function was to carry the primary insurance coverage for the Beech product liability exposure. For the first several years of its activity, the primary layer of coverage was $2 million annual aggregate loss and defense expense. As the cost of product liability exposure increased, the primary coverage underwritten by Travel Air was enlarged until it reached the parameters set out below.

In 1981, Travel Air Insurance Company, Ltd., the Bermuda company, organized a wholly-owned subsidiary called Travel Air Insurance Company (Kansas) in order to provide a U.S. domicile which would reduce the burden of excise taxes imposed upon foreign primary insurers. In terms of both underwriting and claims, as well as accounting, the Companies function in tandem and may be regarded as a single company.

At December 31, 1986, the last period for which Coopers and Lybrand audited financial statements have been prepared, the consolidated companies had a combined capital and surplus of $5,395,000. Of this amount, $2.5 million consisted of retained earnings, which means that after 14 years of operation the Travel Air Companies had retained earnings which averaged $178,570 per year. The Companies have never paid a dividend and it is obvious that the accumulated earnings of $2.5 million could be wiped out by one unanticipated loss.

Over the years of operation, a conscious effort has been made by the Travel Air Companies to set a premium for the primary layer of coverage which, together with investment earnings, would account for the average expected losses for the insurance year, and the accumulated earnings figure reflects how close those calculations have been on the average. The Companies have not made any attempts whatsoever to disguise profits or enhance the appearance of product liability losses.

If requested, Travel Air Insurance Company would be willing to support the foregoing statements by submitting to the Subcommittee or its Chairman audited financial statements for 1986 and, when available, for 1987.

It has also been suggested by representatives of the American Trial Lawyers Association that the Travel Air Companies reinsure the Beech risk in the world market and are concealing profits through the reinsurance arrangement. This claim is absolutely false. Travel Air Insurance Company (Kansas) reinsures the major portion of its risk with its parent, Travel Air Insurance Company, Ltd. (the Bermuda company organized in 1972), but Travel Air Ltd. has no reinsurance. The excess coverage purchased in the world market is purchased by Beech Aircraft Corporation as excess or catastrophe coverage, and the Travel Air Insurance Companies are not, in any sense, reinsured nor do they appear as co-insureds or otherwise recoup their losses from other underwriters or insurance companies.

The self-insured (including Travel Air) costs and excess premium costs incurred by Beech for the 4-year period specified above are correctly summarized as follows:

Calendar 1983

Beech was self-insured (through Travel Air Insurance Companies) for the first $4 million annual aggregate loss and expense, 100% of which has been incurred or spent.

For excess insurance coverage during calendar 1983, that is, layers of coverage above $4 million annual aggregate and extending to $400 million annual aggregate, Beech paid premiums of $2,178,408.

Accordingly, Beech's outlay for product liability exposure from occurrences during 1983 amounted to $6,178,408.

Calendar 1984

Beech was self-insured (by Travel Air) for the first $5 million annual aggregate loss and expense, 100% of which has been incurred or spent.

For excess insurance coverage during calendar 1984 (coverage above $5 million annual aggregate and extending to $400 million annual aggregate), Beech paid premiums of $3,167,529.

Accordingly, Beech's outlay in 1984 to cover its product liability exposure for occurrences during that year amounted to $8,167,529.

Calendar 1985

Beech was self-insured (by Travel Air) for the first $10 million annual aggregate loss and expense, 100% of which has been incurred or spent.

For excess insurance coverage during calendar 1985 (above $10 million annual aggregate and extending to $500 million annual aggregate), Beech paid premiums of $9,627,435.

Beech's outlay to cover product liability exposure for occurrences during 1985 amounted to $19,627,435.[1]

Calendar 1986

Beech was self-insured (by Travel Air) for the first $30 million annual aggregate loss and expense, of which approximately $12.2 million was deemed incurred--meaning that Beech expects to pay and has provided for through Travel Air Insurance Company approximately $12.2 million for defense costs and loss costs for occurrences during calendar 1986.

For excess insurance coverage during calendar 1986 (coverage above $30 million annual aggregate and extending to $500 million annual aggregate), Beech paid premiums of $10,716,974.[2]

The outlay in 1986 for Beech product liability exposure for occurrences during that year amounts to $22,916,974.

Paid Losses and Expenses

During the same four calendar years, the actual cash payouts by Beech (Travel Air) and the excess insurers, for losses and defense costs on claims and litigations closed during the year, were:

1983	$12,245,787
1984	13,459,564
1985	20,062,278
1986	16,070,624

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[1] In addition to being self-insured for the first $10 million, Beech was also self-insured during 1985 for approximately 48% of the first excess of $10 million over $10 million and now anticipates an additional self-insured payout of approximately $800,000 for its share of the first excess.

[2] Beech was unable to obtain full coverage in the first excess and is exposed for approximately 10% of the losses above $30 million and below $100 million. At present, Beech has no expectation of additional liability costs for its self-insured percentage of excess insurance coverage.

Senator FORD. Thank you very much, Mr. Martin. We might notify Mr. Hogan that by the request of the members of the committee he will testify next.

When you say your costs will be reduced dramatically in the next three to five years with this legislation, and with the time of repose, which is the statute of limitations as some of our laymen understand it, is that statute of limitation against the company as it relates to the manufacturer of the product?

Does that eliminate the possibility of the passenger having the opportunity to file suit against the owner of the airplane, negligence by the pilot, and things of that nature? Does that limit them in that ability at all, other than the what the limitation might be as it relates to bodily injury?

In some states, it's a year for bodily injury, and maybe five years for property damage.

Mr. MARTIN. I do not want to confuse terminology here. A statute of repose is a term of rather recent origin in the legal business.

It is a statute which says a product which is more than so many years old, you cannot bring a suit for a manufacturing or a design defect.

A statute of limitations says that you have a certain length of time, which in most cases is two to three years, to bring an action from the time you are injured.

Now, to answer the question you asked, no, the statute of repose applies only to the manufacturer, and if the pilot was negligent, it does not bar an action against him regardless of the age of the airplane, by one of the passengers, or anyone else injured.

I might also point out that this statute of repose is not the conventional statute of repose. The statute of repose is a rolling statute, which is to say that if you put a new system on that airplane, you put a new wing on it, you put a new piece of avionics in it, you put a new engine in it, the statute of repose, whether it's 12 years or 15 years or 20 years, as to that component, begins to run from the time the replacement has been put on.

So in the normal course of things, if an airplane has a new engine we will say every 15 years, if the engine quits, even though the airplane may be 30 years old, the engine manufacturer is exposed if he has made an engine that has gone into that airplane in the past 15 years.

Senator FORD. Mr. Martin, the engine could be manufactured or parts could be manufactured by somebody other than Beech, I suspect.

Mr. MARTIN. It always is. We do not make any engines.

Senator FORD. So those parts, then, that are acquired by a private operator, fixed base operator, whatever it might be, or an individual, Beech would not have any liability under that, the rolling circumstances, because the engine would come from someone else or the parts would come from someone else, and that individual would be in the rolling statute of repose.

Mr. MARTIN. That is correct, unless Beech installed the engine, and possibly if it was a Beech-approved engine and you had an alleged design defect, Beech might be in the line of fire right along with the engine manufacturer.

Senator FORD. How many members or entities could be in the line of fire in a crash of an aircraft, under the present circumstances?

Mr. MARTIN. You mean under the present system?

Senator FORD. Yes, sir.

Mr. MARTIN. Oh, almost an unlimited number. Mr. Sontag is a good example. His company makes a magneto, which is a part of the ignition system, electrical system for the engine.

He is in the line of fire. The engine manufacturer is in the line of fire. The—probably—what we see here is, typically, you will find a—well, most typically, as you can tell from the figures I gave you from the 203 accidents, in 118 cases the NTSB found that it was pilot error, and in another almost 50 it was either maintenance or weather.

So you see that accounts for almost 160 out of the whole 200 was another cause.

What we will see here is, the airframe manufacturer is joined, as the final assembler of the product, and liability is asserted against him for all defects.

The engine manufacturer is joined. The avionics people may be joined. The magneto manufacturer may be joined. The oil pump manufacturer or the fuel pump manufacturer may be joined.

The theory of the plaintiffs' lawyers is, get all these defendants in, even though you really do not have anything in your file to show that they——

Senator FORD. And then look for a deep pocket?

Mr. MARTIN. Yes, look for a deep pocket, and get them fighting among themselves, and see if you cannot come up with some kind of theory to tag one of them.

Senator FORD. Mr. Sontag, did you want to say something?

Mr. SONTAG. Yes. Senator I was involved in one lawsuit in Chicago where we had 18 defendants.

I was involved in another lawsuit out in California where there were over 40 defendants named.

And let me tell you that a majority, in the suit that had 18 defendants, a majority of those people had to pay their way out of that lawsuit, well before they ever got down to the final shakeout on who was responsible.

Senator FORD. That is a typical operation. Is it not?

Mr. MARTIN. I would like to leave another point with you. The figure that I gave you of $530,000 that we know on the average one of these occurrences is going to cost us, is just our cost.

It is not the cost of the engine manufacturer. It is not the cost of the magneto manufacturer or anybody else.

Senator FORD. If you were one of the 18, that would be one-eighteenth. Would it not?

Mr. MARTIN. If they all had equal costs, that is probably true. But I do not think that is usually the case.

But I will say that collectively or from a pyramid standpoint, this average cost of $530,000 is probably less than a fourth of the total cost that the defense side puts out in these cases.

So these are going to cost you a couple of million dollars. It costs the industry as a whole.

Senator FORD. I just have a couple questions. I could ask some more, and I may have some questions in writing for you and ask you to respond in a timely manner.

But now you show that the accidents are going down, and of course the expenditure is going up. That is not peculiar to your industry, by the way.

All product liability cases, we have the fantastic cases of products 33 years old, that went from the manufacturer to the military to an auction to, a surplus plant. And first thing you know, somebody loses a finger. And it is a pretty good lawsuit.

What is the current data on general aviation safety record? Mr. Martin and Mr. Stimpson gave us the figure of 203. Now, is this the total number of accidents? This says fatal accidents.

But Mr. Martin included other accidents that exceeded $100,000. And that was 203 in the last four years that were attached to Beech. Now, can you give me something like that, other than fatal accidents?

Mr. STIMPSON. The overall accident picture is down also. If you look at general aviation accidents in total, that has been declining.

I would be glad to supply those numbers for you also, Senator. But that record is down also.

Senator FORD. Well, if you would give me a breakdown, you show the fatal accidents on this chart, and that is very fine.

But if there is some way you can show an injury claim versus fatality, that sort of thing, I want to get as much of the detail as I can, so when we get into it——

Mr. MARTIN. I can give you some of those numbers off my sheet, if that will help.

Senator FORD. Why do we not just get those together and let Mr. Stimpson put those in for you, Mr. Martin, and he can represent that as Beech's records.

Mr. MARTIN. Of these 203 lawsuits, or current lawsuits that we are talking about, there was a total of 599 people on board.

Senator FORD. An average of three per plane?

Mr. MARTIN. An average of three per aircraft. Now, of that number of people, 440 were fatal, 95 were serious injury.

Now, the reason this chart is constructed in terms of fatalities is, when you get into what is a serious injury, you get problems. Everybody's figures are different.

We have a serious injury classification for Beech. The NTSB has one, FAA has one.

Senator FORD. Can we do it this way, then? If we could look at fatalities versus survival, with injury.

Mr. MARTIN. It is a pretty good solid number. It shows the trend.

Senator FORD. Let me ask, then, this final question. I know that all of you believe that the bill's limitation on joint and several liability and its 20-year statute of repose ought to lower your liability costs. And Mr. Martin has said it would have a large impact from three to five years to his company.

What about the uniform standards of liability that would replace the different state standards, as such? Are they going to save you money in litigation? And do you expect something like that to lower your insurance costs?

Mr. MARTIN. Sure they will. But I think I want to say to you that I think that is perhaps the most important aspect of the bill.

This is an attempt at moderate balanced litigation. But it levels the playing field. And I think over time that is going to help as much as any other thing. That is a very important part of it. That is, the uniform standards.

What we are confronted with now is 50 different jurisdictions with 50 different sets of changing rules, some of which are, I contend, radically unfair.

Senator FORD. Personally, Mr. Martin, I am very much opposed to the Federal government getting into the insurance business or pre-empting the states.

I have only voted one time that I know of to pre-empt the states and that was so General Electric, Sears Roebuck, Montgomery Ward and all could print their catalogue. And that was under the Energy Committee. And so it had nothing to do with what we are doing here.

But I am very reluctant. Before we know it, we are going to have a national commission. So I will not get into that one with you. But Senator Kassebaum?

Senator KASSEBAUM. I would like to follow up on that answer. Mr. Martin you said there are 50 different states and different standards.

Could you give me several examples of major differences in product liability laws in the various states that adversely affect general aviation?

Mr. MARTIN. Yes. I will give you some of the most dramatic ones. There are a few states, perhaps 10, that require proof of negligence to hold a manufacturer.

The other 40 hold the manufacturer liable on what we call a strict liability theory. The question is, is the product unreasonably dangerous? There are states that have a two-year statute of limitations for bringing the action. There are states that have a six-year statute of limitations for bringing the action.

There are states that have a system by which you can file an action and not notify the person you have sued, and let the action sit there with him now knowing he is being sued. And then later on when you choose and you have told the statute, then you can activate your case by serving him.

There are states which follow the so-called John Doe rule, which allows you to sue one manufacturer and join 50 John Does. And that is just the way it is stated. And by joining the John Does, you have told the statute against everybody else in the world. And then you can bring him into the lawsuit halfway down the line.

Those are some of the most, there are states, there is one state which says that a jury can decide whether or not the FAA acted correctly in certifying a design.

Here is a group of engineers, very capable engineers, a system that you establish years ago to administer the design system for all aircraft. And here is a state that says we are not going to pay any attention to that, a jury of laymen will decide whether the FAA acted properly.

There are other states that would not touch that, would not adhere to that at all. It is a wide variety of rules. And of course, there is forum shopping with these airplanes, I mean with these accidents.

You find cases, there are usually three to six jurisdictions in which a case can be brought. You will find the cases concentrated in those jurisdictions which are more favorable to the plaintiff's side of the case.

And it is the plaintiff that chooses normally where you are going to litigate. I mean, I could go on forever. But you do not want to hear that.

Senator KASSEBAUM. I think that is a good example, because, as you know, there are state attorney generals who believe that their own states have product liability legislation laws that are stricter than the standards we are talking about here, and have fought against uniform liability legislation because of that.

Mr. MARTIN. In isolated areas, that could be true.

Mr. STIMPSON. I think that is true also on the statute of repose, for example, Senator Kassebaum. Some states, a number of them have a lesser standard than 20 years.

Oregon has eight years, I think Nebraska has 10 years or something. So in an attempt to get uniformity, this bill does give up some more favorable statute of repose, for example, in a number of states.

Mr. MARTIN. You see, our problem is this. It is the uncertainty of the system as well as the cost of the system.

The insurers who underwrite these manufacturers, they look at the same data we look at. They know that anyone of these cases could generate a $100 million verdict. Not any one of them. But you are likely to be confronted with one that can do that.

They know that the law is very hostile to the manufacturer in certain jurisdictions, and they know that most of the cases are going to be brought there. It is the uncertainty of not knowing what is going to happen that drives up these costs.

Senator KASSEBAUM. Mr. Sontag, in the illustration that you gave of the notice that was just served upon you, if S. 473 were law at this juncture, how would that help the particular situation that you are using as an example?

Mr. SONTAG. Well, one of the provisions of S. 473 is that it requires that a rule called Rule 11, I am not an attorney but I have learned all about this stuff in the last few years, the hard way.

There is a rule called Rule 11 which is a rule that allows a court to sanction an attorney, if he has done something out of line. For example, bring a frivolous suit.

In my experience, and I am sure the experience of Bob Martin, that rule is very rarely invoked. So that what you get is an awful lot of specious suits. In my opinion, based on what I know after three days of investigation, and by the way I have not been formally served on this yet.

My point earlier was, this is a counter-claim to a lawsuit that I am apparently in, and I do not know about. One of the suits that Bob alluded to here, where apparently somebody has filed a suit, it is sitting there and I have not been served yet.

So, if we had S. 473, and if this turns out to be what at first glance is a suit that is based on very, very thin grounds, then I would say I have a chance of at least recovering my legal expense in defending myself.

Today, in the environment that we currently have, I have practically no chance of recovering the defense costs that I am going to, and our insurers are going to, to defend ourselves in this action.

Senator KASSEBAUM. Frivolous suits seem, indeed to be part of the problem. Our whole judicial system today, bears some responsibility for eliminating these frivolous lawsuits.

You are a lawyer, Mr. Martin. Is that not part of the responsibility of the court?

Mr. MARTIN. Yes, it is part of the responsibility of the courts, and it is a responsibility that is not being exercised.

And I think that will change. But it will change slowly. It will take years for us to get back to a system that is more reasonably and more forcibly administered. Because it is involves, you know, a social change really.

We have an attitude in this country, unfortunately, go to the courthouse and roll the dice. You just might end up with a great big verdict. And disregard for the rules of the system is rampant.

I think that will change. The point I want to make here is that this industry is being unusually penalized by that philosophy. And it will be dead before that change comes about in what I hope will be the normal evolution of a legal system.

Senator KASSEBAUM. Thank you very much. It was excellent testimony on everybody's part.

Mr. SONTAG. Senator, if I might just add one thing. One of my objections to the current system is that often I wind up in a lawsuit, as I am apparently in this one, where the plaintiff's attorney has not done his homework well enough to show that my product indeed had the possibility of causing the accident.

In the suit that I talked about that had 40 defendants in it out in California, our company was named along with our only competitor. Now, think of that. There are only two of us that make this product that goes on an airplane, and we are both sued.

Is it not reasonable to expect that the plaintiff's attorney would go out to the accident site, lift the cowling on the airplane, and look at the label? I have been sued in Kansas, and not my competitor sued when it was my competitor's product on the plane.

That is unreasonable. And it is unreasonable to expect me as a manufacturer to tolerate paying the kind of expense that we go through, and all the time and effort that we go through, in defending these darn things when the guy suing us has not done his homework to show that it was our product or potentially our product. And that is where I think the system really breaks down today.

Senator KASSEBAUM. Thank you. Thank you, Mr. Chairman.

Senator FORD. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman. I apologize that I will not be able to stay for all Mr. Hogan's testimony.

Mr. Chairman. I also understand that the general counsel for AOPA had to leave.

I certainly regret that those who truly represent, I think, the small airplane-aircraft consumer will not have a chance to respond to those who purport to represent the consumer.

I would just like to make a couple of points, if I could, Mr. Chairman. One is that if the primary motivation for civil aircraft safety improvements is the spectre litigation, then I wonder what it is that has been responsible for the steady improvement we have seen in military aircraft safety, since we all know that it is extremely difficult, if not impossible, to bring suit when a military accident takes place?

I think that Mr. Hogan and the trial lawyers will purport to speak for the consumer and their rights. And I would say that we as Americans have a right to have qualified pilots, which we will not have if there is a disappearance of general aviation in this country.

I think we have a right to have the highest quality technology in equipment, which will be scarce, if not impossible, to find. And if it is able to be found, it will be inordinately expensive.

I think we have a right to expect to be able to provide our citizens that want to fly with the highest quality equipment, which none of them will be able to afford. So I appreciate the testimony of the witnesses, and I would be glad to hear any response they would have to those statements, Mr. Chairman.

Mr. MARTIN. I completely agree with you. The training ground for commercial pilots who fly us all is general aviation.

And as we reduce the ability of young men to learn to fly——

Senator MCCAIN. And women.

Mr. MARTIN. And young women. We reduce the pool from which those airlines then can draw.

And another thing about this thing that is sad, as far as I am concerned, that no one really touches on, I have had in the past three years I think four different groups of young men or small companies come to me and say, we want to start out to make a, we have a new design of airplane. Or, we have a new design of an aviation component. What can we do, how can we start in the business?

The answer is, you cannot start in the business. Well, you can start in the business. But you are going to have to risk your entire fortune. And the only thing I can tell them is, if you are going to do that, you are going to have to go abroad. You cannot do it here.

Because the first accident, you know, usually they have slight capital. They cannot borrow money. The bankers know what is going on.

We are fixing it so young people, young engineers, young people with an idea that they want to improve a product or build a new product, cannot get started. That is bad. That is really bad, long-term.

Mr. STIMPSON. I think also, Senator McCain, if you look at this industry, it is a little industry. It was a gem of an industry a few years ago. And what has happened to it.

And you look today as to what is the biggest single factor that has caused these problems. Sure, there are trade problems, there have been problems with the economy. It is not all product liability. We are not saying that.

But it is a cancer which is eating at all segments, whether you are a manufacturer or whether you are a pilot who wants to buy a new airplane, or whether you want to take flight training, or whether you are a flight school.

When flight schools are getting out of the business, because they cannot afford the insurance anymore, it is a total picture. And if you look at the whole thing, what is happening here and what we have been talking about this morning, this would probably be the largest single factor that could help the industry again.

Mr. SONTAG. Senator, if I might just say something. I am an entrepreneur. I am not just a professional manager.

I wound up buying this company with some investors about eight years ago and had the unfortunate experience of timing it exactly, almost to the month, when the industry began to fall on its ear.

And some people, by the way, would say that it is an interesting coincidence that Rick Sontag got into the business at that very month. But from my experience, the real problem that you have got is the amount of time that you spend on these things.

I cannot tell you how much time I spend on lawsuits and organizing lawsuits. I am the defense counsel for our company internally, because we are too small. And I spend so much time on lawsuits that all the product development, all the changes that I would really like to do at the company I cannot do.

In the last two weeks I spent six days of my time on product liability lawsuits. Now, that is six-tenths based on a normal five-day work week, it happens to be a lot less for the days that I work.

But that much of my time is spent on trying to organize and defend lawsuits. There is something wrong. This is not the way business was meant to be. And this is part of the problem that we have with U.S. industry that gets involved in product liability litigation.

It is a tremendous drain on resources. The system is being administered improperly, and this is the way it works in the real world.

Senator MCCAIN. Thank you, Mr. Chairman.

Senator FORD. Senator Exon?

Senator EXON. Thank you very much, Mr. Chairman. Let me follow up on that just a little bit.

You suggested, Mr. Martin, that these new ideas and concepts that engineers might come up with, had to go elsewhere, overseas someplace.

I suspect also the follow-on conclusion to that is that since, if they develop that project overseas and then start selling the aircraft in the United States, they come under the same court systems and large awards that they would otherwise.

So not only would your advice to them be to start their business overseas, but also most of their production is going to be sold overseas. Is that true?

Mr. MARTIN. Yes, sir. There is an enormous market for general aviation airplanes overseas. Africa, Asia, they do not have roads the same way we do. And they cannot afford to build them.

And the general aviation airplane is widely used in the rest of the world. And that is exactly what I tell them. To build your airplane over there and sell it over there. Keep it out of here.

Senator EXON. That leads me to my next question, then. The obvious conclusion is that the court systems that we have in the United States—and there are arguments as to whether they are correct or not—they must be significantly different in the matter of product liability than what has evolved in the United States since 1968 or whatever year it was. Is that correct?

Mr. MARTIN. It is. Vastly different. The whole system is different abroad.

Senator EXON. We have heard that before. We had a Lloyd's of London representative in here two or three years ago on this whole matter of product liability.

You said you had great respect for lawyers. Evidently you do not have as much respect for the legal system in the United States, that has allowed this to evolve. You certainly know as a lawyer that we have allowed the bar associations to generally subscribe and put parameters on what happens in the legal profession.

Who is primarily responsible for the serious situation that you and others have brought before this Committee with regard to our product liability laws seemingly getting way out of step, at least with what is happening in other of the industrialized nations?

Mr. MARTIN. Well, Senator, the first thing we have to do is to put my criticism and your criticism in the proper context.

Not all industries are affected this way. There are liability-sensitive industries, and this happens to be the most sensitive of all of them. This is the most sensitive. And there are figures or articles that have been written about it that indicate that.

Generally speaking, products in which people transport themselves or which they ingest or which they use machines they use around the household, that encompasses the liability-sensitive products, if you do not class medical services and that sort of thing as product.

Now, the rest of the industrial base is not all that badly affected. The legal system, I am not proud of the legal system in the way it has treated those industries. It has gotten out of balance.

Our overall legal system is unequal to any place else in the world. And when you look at it on a broad basis, I think we have got a good system. It has just gotten out of balance in certain areas, and this is one of them.

Senator EXON. I would just say to you, Mr. Martin, that other witnesses before this Committee might not agree with the statement that you have just made.

We have all kinds of manufacturers having nothing to do whatsoever with the aircraft industry that have made similar appeals to this Committee, speaking of the Commerce Committee, with regard to product liability in a whole series of fields.

I am talking particular about the agricultural manufacturing industry. There are many that have been hit very hard. So I do not know that you are only alone in this.

But I suspect you have been hit a little harder, because you deal with a more expensive product, of course. Let me ask this question, trying to get at the bottom of this, so I understand it.

Both fatal accidents from 1946 have decreased significantly. At the same time, we have seen increases in out-of-pocket expenses, primarily, as I take it, because of the thriving of these types of lawsuits.

The next witness is going to have something to say about that, I am sure, and I want to listen to what he has to say.

Is it not true that, for the most part, airplane accidents, the large percentage of them, come down to pilot error?

Mr. MARTIN. Yes, sir.

Senator EXON. Can you tell me, of those accidents, each and every year from 1946 through 1986, were 70 percent of those pilot error? 50 percent? 90 percent?

Mr. STIMPSON. Generally, Senator, it is around 84 percent under NTSB calculations. It runs fairly stable in that area, about 84 percent.

Senator EXON. What do you run into in defending lawsuits that are brought against the companies that you represent if pilot error is the reason for the crash?

As a layman it would seem to me that if the pilot made an error that he and he only or the company that he works for would be responsible, and not the people that make the airplane.

How is that treated in the courts?

Mr. MARTIN. Well, let me give you an example of that. We have a class of cases as does everybody else that we can gustlock cases.

If you have an airplane on the ground, if the wind comes up, you do not want the wind to blow the control surfaces around, bang them up and bend them.

So you have a system in the cockpit where you freeze the elevator in neutral; you freeze the rudders; and very often you have another device that holds the throttle back.

Now everybody paints those control locks red. They have a pilot operating handbook that says, remove the control locks before you start the airplane. They have a check list that says, control locks off.

The last thing you do before you take the airplane off is move the controls to see that they are free.

Time after time some guy gets out there and starts his airplane. It is a little windy, so he leaves the elevator or the rudder control lock in to save the trouble of having to hold the wheel while he taxis out, and he forgets it.

And he takes off with his controls locked, and of course he is dead. He is going to crash. And we get sued.

And the contention is, if you had made the flag a little bigger, and painted it yellow instead of red, he would have seen it and he would have removed it.

Senator EXON. What happens—what about if he forgets to put the landing gear down when he comes down from this flight? You must have had that.

Mr. MARTIN. Well, the argument that is made under the current state of the law is, well, if you had had a different type of switch, or you had it in a different place, he would have seen it and he would have remembered to put the landing gear down.

We get into arguments about, should you have the attitude gyro directly in front of him, or the airspeed indicator directly in front of him, or the turn and bank indicator directly in front of him.

You cannot put them all in there, and you have experts take the stand and say they are human factors experts, and they know that people's eyes work a certain way, and it would be better if you had your panel arranged in a different way.

We run into these lawsuits, not infrequently; frequently.

Senator EXON. Well, Mr. Chairman, I have appreciated this. This is very good testimony. I do not wish to prolong it any further, except to say that every time we get into these things, whether it is the airline industry or the manufacturing industry in general, it seems to me that the main problem is that we have got a court system that is totally out of control.

I am not sure that the Commerce Committee can fix that. We are going through these exercises, and I am a cosponsor of this bill because I think it is necessary.

But the main root cause of the problem is, certainly gauged against the court systems in other parts of the industrialized world, have better control of the situation, and have advanced a system that is more reasonable than what we have in the United States.

Even if this bill passes and cures this problem at least partially in the aircraft industry, there are an awful lot of problems out there remaining, and it seems to me that by and large lots of these problems are matters that should be referred to the Judiciary Committee.

I do not subscribe that the Federal Government should be policing the legal profession. But I, as a nonlawyer get the impression that the legal profession is not doing the job that I think it should be doing in this area.

If they were doing it, we probably would not have any need for the legislation that we are talking about today, nor would there be any need for you to take your time and come in here and testify.

I have appreciated your testimony.

Mr. MARTIN. I agree with you, sir. It is out of control.

Senator EXON. Thank you.

Senator FORD. Just one final question, unless Senator Kassebaum has something.

I am trying to think back to the foreign manufactured airplanes that are here in our general fleet. If I understood your testimony correctly earlier, you said that their liability insurance is less than the domestic manufacturers' liability.

And the reason for that is that they have fewer aircraft in the country, therefore they are newer airplanes, and therefore their liability is down. And after they have been here for awhile and accumulate the massive number that domestic have, their problems will be the same.

Am I correct in that statement?

Mr. STIMPSON. You are basically correct, Senator. There is one other factor. To date, the penetration of foreign manufacturers has been primarily in the jet airplanes, too, which are the more sophisticated airplanes, usually operated by two pilots, safety equipment on them. And that has not been the product liability problem that the smaller airplanes have.

As we see more single engine piston airplanes, which are not necessarily operated by professional crews, et cetera, coming into the United States, I expect that problem will increase also.

Mr. MARTIN. I don't think we'll ever get as bad as ours, because they will always sell a larger percentage of their airplanes overseas.

Mr. STIMPSON. But it is the large tail which the U.S. manufacturers have, that the foreign manufacturers basically do not have.

Senator FORD. Fine, any other questions? We thank you very much. You have been on the witness stand here now for about an hour and a half, and a lot of people are getting itchy.

And so we are about to request to have Mr. Hogan come forward now to give his testimony.

STATEMENT OF R. BEN HOGAN III

Mr. HOGAN. Good morning.

Senator FORD. Good morning, Mr. Hogan.

Mr. HOGAN. Forty years ago, about that, Jimmy Stewart was in a movie where he played a courageous airplane manufacturing engineer who had calculated that after a certain amount of usage or hours in flight of this certain type of airplane's tail would fall off.

And you will remember, if many of you have seen this movie, he actually goes so far during the movie to actually intentionally crash one of his own company's airplanes, or while it is on the ground, he pulls the landing gear lever so that the people on the plane will not die, as he thinks they will.

And by the end of the show, he has proven his point. One of the tails that is being experimentally tested does fall off, and nobody dies, and Jimmy Stewart is the hero.

Senator FORD. I missed that movie.

Mr. HOGAN. It is around. You will see it if you look for it.

But in real life, what often happens, and I guess it is my point for being here, is that the tail does fall off. The engineers who are standing around looking at it are engineers who work for attorneys representing the people who were in the airplane, and the object becomes to determine why the tail fell off, and to obtain as much information from the airplane manufacturer to prove why.

And then, as a byproduct of the process, to prevent it from happening again.

And I want to tell you about a specific example that has already been alluded to that would not have been possible were this bill the law just four years ago.

There was in the same period of time, 40 years ago, begun an airplane called the V-tail Bonanza. It was a unique design. It does not have the vertical tail surface, which gives you lateral stability, or gives you stability in gusty wind conditions.

But because it does not have that tail surface, it goes faster and has less drag. And it is sort of a sexy looking airplane. Sold a lot. Very popular. Been around a long time; a lot of people flew it.

But at the rate of about seven a year, if averaged over a period of time, they have been breaking apart in the air and falling out of the sky and killing everybody in the airplane.

All that period of time, from 1946 or '7, when they first started being made, up until I guess the trial of the Byer case in 1985, Beech always took the position that the pilots were at fault; that the pilots—of course, the pilots were never around to testify. They always die. Everyone in an airplane dies when it comes apart in the air.

And Beech would always take the position in these cases that well, it was the pilot's fault, because the pilot would have gotten this airplane into a dive, it would have gone beyond the speed limit of the airframe, and would have broken apart for that reason.

And of course you might have engineers that would come in from the plaintiff's side and say something different, but they didn't have any success. Beech always won.

Until they got to my case, where they had a problem, because there were some eyewitnesses on the ground who had seen it break up, and it was not in a dive.

They still took the position in court it had to be in a dive. They ended up having to call these eyewitnesses liars.

It did not work. There was a jury verdict. And after that, the FAA—or during the process of the lawsuit, the FAA and Beech got together and they started some testing, and to Beech's credit, and I give them credit, after this lawsuit, they went out and fixed the problem.

They, first of all, issued an air worthiness directive, or asked the FAA to do so, and the FAA did, slowing down all these airplanes until a fix could be found. And then they found a fix where they would better attach the tail to the airplane so it would not come off.

Now, my airplane was made in 1956. That is more than 20 years before its accident. The lawsuit would never have been brought because of this 20 year statute of repose in this bill.

Now you say, 20 years is a long time. Any airplane out there for 20 years should have an automatic cutoff period.

But Beech's vice president said in an SAE article that the Beech V-tail Bonanza was supposed to last—its airframe, and that includes the tail—was supposed to last 10,000 airframe hours.

Now 10,000 airframe hours might be 10 years, but it might be 30 years, or it might be 40 years. It depends on how often the airplane is used. How much it sits around in a hangar.

The tail is not supposed to fall off the airplane, or break off the airplane in gusty wind conditions, with only 3,500 hours of use, as happened in my airplane.

But if this bill had been the law 4 years ago, this lawsuit, and the widow and children, would have been out of court.

Now in my State of Alabama, my Supreme Court has ruled that statutes of repose like this are contrary to the State constitution. But of course this committee has the power, the Senate has the power, through the commerce clause of the constitution, override what Alabama wants to do, and New Hampshire, and Florida, and—well, not Florida, but New Hampshire and some other States who have also ruled that a statute of repose is contrary to their State constitutions.

But what you are doing with a statute of repose like this is, you are throwing people out of court, no matter how good their case, no matter what the facts, after 20 years of airframe usage, even if the airplane was supposed to last longer than that.

Even if a tail falls off. Even if a wing falls off, after 20 years, when it is supposed to last a lot longer than that, according to the manufacturer's own statements.

Now that is not to say a statute of repose might not be enacted. But it should be based on something like the model product liability bill that creates just a legal presumption instead of an outright bar.

I do not mind going into court with a legal presumption against me that if something is 20 years old it is presumed that it is all right, and I have to prove that it was not. I would have to come up with this statement, and I would have to put this into evidence that it was supposed to last 10,000 hours instead of 3,500 hours.

Lawyers face legal presumptions all the time. But people should not have to face absolute bars to recovery, especially when our own State supreme courts have said it is unconstitutional under our State constitution.

And I would ask this committee to think twice before overriding what some of the States want to do about that.

The statute of repose is the main thrust of this bill. Anything else in this bill, if you did it for the aircraft manufacturers, it really would not cause much problems.

It might be to their benefit. Fine, give it to them. If they want to be in Federal court rather than State-court, like they do under this bill, they want to be in Federal court for all these cases, you are going to have to fund the Federal courts more. You need to be aware of that, because you are shifting a whole class of litigation out of State courts and into Federal court.

But that is all right. Victims can go to Federal court as easily as State court, in a lot of instances. If you really want to do that, and transfer all these cases to Federal court, which is what they want you to do, do it.

Of course you need to fund the Federal courts that much more, because you are going to burden their system that much more.

I want to respond to some of the things that have been said. I tried to take some notes.

On the issue of safety, and I think this whole concern that I have is the issue of safety, pay attention to the fact that under the present liability system, fatal accidents have been going steadily down.

What you are being asked to do is change drastically that Federal liability system as it applies to the very airplane manufacturers that have created and shown you these statistics.

For the last whatever it is years, fatal accidents are going down every year under our current tort system.

Now they will say, it will not make any difference. But what if it did? It cannot get any worse.

Now here we have the other bogus thing of liability premiums. I want to talk about that a little bit, because that is really where I think a lot of their testimony is coming from.

When Bob Martin tells you that Beech is self insured, he is stating—that is a way of framing the truth. But actually Beech has their own insurance company, Travel Air Insurance Company.

And when he says, we get insurance in the foreign markets, he is really talking about reinsurance. I want you to know that, because it makes a difference.

When Bob Martin or anybody else stands up here and tells you that they are adding $70,000 to the cost of an airplane because of insurance premiums, what they are doing is, they are taking $70,000 out of their left pocket, Beech, and putting $70,000 into their right pocket, Travel Air Insurance Company, that they wholly own.

Now, does that mean Travel Air Insurance Company is losing money? You need to know, before you pay any attention to how much insurance premiums they are paying on these airplanes, paying themselves on these airplanes, whether their insurance company is losing money.

If their insurance company is taking $70,000 worth of premiums per airplane and making a ton of money on that, then it is unfair to be coming up here and asking you for relief for $70,000 in premiums that they are paying themselves per airplane.

Another thing about this $70,000 figure that you need to be aware of, and it is within their own testimony if you look at it carefully, what they are telling you is this. They are saying, every new airplane we build, we are apportioning all of our insurance premiums that we pay ourselves.

And it turns out that we are building so few new airplanes, that this would be equal to only $70,000 per new airplane.

Now the impression you may get—and if you did, it is a false impression; I am not saying they said this either. I am not trying to accuse them of anything. But the impression if you got it that would be a false impression was that what they are insuring are just new airplanes for $70,000. That is not true.

The $70,000 figure is just an artificial gimmick, a bogus number that has been created. Because what they are really insuring are all those thousands and thousands of airplanes that are out there in the fleet that they have already made that are flying around.

And when they take that insurance premium they are paying themselves, and divide it, not just among the new airplanes, which are very few, but among the whole fleet out there, they may be paying themselves insurance premiums at the rate of only a few thousand or maybe even a few hundred dollars per airplane that they have made.

I would just point that out to you. I am not here to say that they have tried to represent anything falsely to you. I am not going to say that at all.

Senator FORD. You are going to infer it, though, are you not?

Mr. HOGAN. No. But I will say this, it is a bogus number. That $70,000 is a bogus number. It should not even be used, because it bears no relationship to anything.

Federal regulation seems to be the main thing that the manufacturers cite to you as why they can be left alone and not have to fear the tort system.

In other words, they come to you and say, we do not really need the tort system to keep us straight, because we are regulated every step of the way.

Well, this has been pointed out in previous testimony to many committees. It is probably not new to either one of you Senators.

But I want to point out this, that really what happens in real life is that the FAA operates under what is called a delegated option authority. And that simply means this, that the Federal Aviation Administration delegates to Beech the authority to approve their own airplanes after certain qualifications are met, and the first model is approved and so forth.

Now what does that mean? For example, in the case of a Beech Bonanza, way back in the 1950s sometime, Beech got the delegated option authority, got the authority to start certifying all future—or certifying the Beech Bonanza airplane.

So ever since then, since the early 1950s, when Beech comes out with a V-tail airplane, puts it on the market, Beech employees paid by Beech certify that airplane for the FAA.

That is true, and that is the kind of FAA oversight they have. Now, that is not to say it is a bad system. You do not want the—the Federal Government cannot afford to have FAA people looking over their shoulder all the time.

But you do need to know that you do need the backup of the civil justice system over that kind of an operation.

And if you do not have it, you are endangering that line going down there of fatal accidents that have been dropping.

Foreign competition, Senator Ford made the point that I was going to make. The foreign companies that come in here, if they have a dangerous airplane or a defective airplane, they are exposed to the very same liability as Beech or Piper or Cessna. It is no different.

And if they bring a defective airplane in here, and the tail comes off or something, they come to the court system just like Beech. They are on an equal plane. They have to fight it out there, just like they do in the marketplace against Beech.

Paid claims is a point that was made. They have risen, and there is no question that that is true from 1977 to 1985. In the case of Beech, I suspect a significant percentage of that had to do with the fact that once Beech finally did recognize that the Bonanza was defective, it went out and settled all their Bonanza cases.

That is a great big lump of I do not know how many—Bob Martin would have to tell you how many V-tail cases were out there at the time they decided, his company, to settle them all. But sure, that happened.

But then those were people that deserved—the widows and orphans and so forth—who deserved to be compensated for an airplane that was defective, and was badly made.

Everyone of those paid claims was either a settlement where AMC—where Beech recognized that they owed the money, or it was a jury verdict where they had to pay the money.

Now, I guess what they are coming in here and saying is, we should not have to pay that much money. But there again, what they are asking for is an automatic cutoff. That statute of repose, that is the reason they are here. An automatic cutoff to exposure to half their airplanes.

I respectfully submit that the best they should get in the way of a statute of repose is a legal presumption. That is what was proposed by the American Bar Institute in the model product liability code.

It is the most fair situation for them. It does help them in the courtrooms.

And other features of this bill are no problem. They are something you need to pay attention to. If you really want all this litigation in the Federal courts and out of the State system, you are going to have to fund the Federal courts.

But as far as a standard set of laws for airplanes, that is fine. As long as you are going to promote safety and not do away with safety.

I am here to answer any further questions.

Senator FORD. Thank you, Mr. Hogan. You are an interesting witness, and your experience gives you a little more interest than the normal witness.

And you brought up a very interesting point where Beech has its own insurance company and is buying insurance.

But if I understood Mr. Martin correctly, they had a huge deductible. And that deductible a couple of years ago was $30 million, and I think last year, $50 million. And it is cumulative; it is not on each accident. It is cumulative.

And at some point when they pay out or are liable for $30 million out of pocket, anything above that, they would pay for it.

And he was talking about $10 million. I think $9 to $10 million was the premium. And it was very interesting that they were paying it to themselves or a wholly owned subsidiary.

Is that your understanding of the insurance agency or company that you referred to?

Mr. HOGAN. What I know about the situation is as a result of a deposition that in fact I took from Mr. Martin in my case, where he explained the setups. I would be interested in hearing from him, and maybe he would respond to this, whether when he says he has a $50 million deductible he is not really just saying that there is reinsurance after $50 million, in other words, his wholly owned insurance company, Travel Air, has to get up to $50 million before the reinsurance kicks in.

Senator FORD. You have to issue an instrument from the insurance company, and that instrument has certain clauses and will cover an individual, corporation, partnership, whatever it may be, or an individual. You must be familiar with insurance because you have probably been a plaintiff lawyer for some time.

That means that a single entity, if I could use that term, whatever it might be, is insured up to a certain amount with a deductible. Like your automobile policy, you have got a $100 deductible, $250 deductible against the damage. So if it is $1,000 damage and you have a $200 deductible, the company would pay $800.

Mr. HOGAN. I know what deductible means. It may well be that what he is telling you is that Beech has decided that their own insurance company will require Beech to have a $50 million deductible rather than kicking in immediately.

But I do know that those kinds of numbers are just decisions on whether the left pocket is going to have the money or the right pocket is going to have the money. And you really do not get the whole picture here as a committee until you learn whether that insurance company, their wholly owned insurance company, has been making outrageous profits from these very large premiums they are paying themselves.

Until you know the insurance profit picture of their wholly owned insurance company, you cannot know whether they are really having trouble.

Senator FORD. Well, Mr. Hogan, why do you not have that information with you here today? You are leaving us out here dangling, saying, well, look at the profit, and you are giving us that—we are presuming now or assuming something that you are trying to get this jury to believe.

Now, I am not going to nibble at that one until you can come with the facts, if they are making money and this is a big boondoggle for Beech and that sort of thing.

What about Ford Motor Company? What about GMAC? What about all the banks out there in the insurance business? Are you against all of them?

Mr. HOGAN. No. I am not against Beech.

Senator FORD. Well, that is fine. But you are making a point here that they are making money and that they are putting that back into the cost of the aircraft. Well, that is the only bookkeeping procedure that you can have.

If Beech has a $50 million deductible, that has to be in that instrument somehow because they will have to reinsure. The company, in my opinion, is not so substantial. They are self-insured to a point, are they not?

Mr. HOGAN. They are self-insured, I guess you would call that. Even if they have their own company, they are self-insured.

Senator FORD. Well, they are self-insured for $50 million if that is the deductible under the policy.

Mr. HOGAN. One way or the other, that is correct.

Senator FORD. Now, on the certification, where you say Beech, is that unusual in the aircraft industry?

Mr. HOGAN. No, and there is nothing wrong with it, either.

Senator FORD. Well, you left the assumption that their paid employees would certify the aircraft. Now, that is true, but it is not unusual to the industry. It is an agreement between the industry and the FAA, and Lockheed, Boeing, all of the others, certify that aircraft under an agreement with the FAA.

Is that not correct?

Mr. HOGAN. But——

Senator FORD. Wait a minute. Am I correct?

Mr. HOGAN. Sure.

Senator FORD. Fine. I like yes and no answers, do you not?

Mr. HOGAN. Absolutely.

But the difference is that presently the people, the public, has the civil liability system to fall back on, whereas if they do not have then they will only have this certification system and it will start to show its true weaknesses.

Senator FORD. Well, the certification program has done reasonably well. You claim that this legislation would be unfair to injured plaintiffs. Yet this bill does not go nearly as far in my opinion—and I am not a lawyer, so I am at your mercy—in the area of tort reform as have bills enacted by many of the states.

So now you talk about this bill being unconstitutional on the statute of limitations, whatever you call that.

Mr. HOGAN. Repose.

Senator FORD. Repose. I am learning a new word here during these hearings.

That that is unconstitutional as it relates to Alabama, and you name two or three other states. But this bill does not go nearly as far as those bills enacted by the states. And for instance, many states have enacted shorter statutes of repose, I suspect.

And in many states, would not the plaintiffs' rights be protected to a much greater extent if a lawsuit was brought under the terms of this bill?

Mr. HOGAN. Yes, they would.

Senator FORD. Senator Kassebaum.

Senator KASSEBAUM. First I would like to say, Mr. Hogan, that the Trial Lawyers Association has usually not chosen to testify. And so at least I am appreciative of your appearance here today.

Mr. HOGAN. Thank you.

Senator KASSEBAUM. Second, I think it is a specious argument that, because of our tort system, fatal accidents have declined from 1946 to 1986. I really fail to see the connection between our tort system and the decline in fatal accidents.

I think it has to do with improved technology, improved training, and really the high standards of safety that we have set in the industry.

Going back a bit to Senator Ford's comments on certification, I find it awfully hard to think that a jury of nonprofessionals, non-engineers, could make a determination on certification that would be acceptable above and beyond that of those who are professionally involved in certification for the Federal Aviation Administration.

How can you justify that?

Mr. HOGAN. Let me respond to your first observation. Why does the industry set high safety standards, or that your opinion or stated opinion is that fatal accidents have gone down because of high safety standards.

I agree with that. But what is the motivation for high safety standards? Corporations are——

Senator KASSEBAUM. Not a fear of being sued.

Mr. HOGAN. Well, corporations exist for one reason, one legal reason. There may be many reasons they exist, but there is one legal reason a corporation exists, and that is to make a profit.

Now, part of what motivates a corporation is going to be the fear of litigation results. If you do not acknowledge that, then you and I just disagree. And it has been my experience that corporations do change their products as a result of or in fear of bad litigation results.

Senator KASSEBAUM. Well, we know in following the history of aviation that many times it does, unfortunately, take an accident to motivate both consumers and the public and manufacturers to recognize a danger.

The National Transportation Safety Board in investigating commercial accidents has many times pointed up deficiencies that they believed needed to be addressed and have over and over again brought up those deficiencies. We many times have held hearings over and over again before finally things did change.

But I really do not believe that safety improvements are brought about just because of the profit motive, and I think this is particularly true in general aviation, where as Mr. Sontag pointed out, you many times have pilots who fly their own families.

I think it is a much more personal relationship.

Mr. HOGAN. Let me give you an example, Senator. After my lawsuit Beech, for whatever reason—and Mr. Martin is obviously disagreeing with what reason—but they issued essentially a recall on all outstanding V-tail Bonanzas, even the ones more than 20 years old—and I suspect more than half of them are more than 20 years old—and brought them in and fixed the tail.

Now, that is going to probably prevent a lot of deaths, that one action that Beech took. And my question to you is I guess a rhetorical one: Would Beech have had any compelling reason to do that? In fact, because of the profit motive, would they not have had a reason not to do that had there been a 20 year statute of repose? No reason.

Senator KASSEBAUM. I do not agree with you. I have a long understanding of the history of Beech and I think they would do it for reasons other than that.

But let me ask you. I was trying to read through your testimony. Was your case in 1985, did you say?

Mr. HOGAN. The accident actually occurred in 1979, but the case was not tried until 1985.

And incidentally, I did not want to interrupt you, but I was going to say that one of the things that was brought out here is the NTSB assigns causes of accidents. Let me tell you a little bit about that system.

The aviation manufacturers—I know this is the case for Beech, because we have sworn testimony that this is so—every day, today and yesterday and every day that goes by, calls up the FAA and finds out if one of their airplanes has been involved in an accident anywhere in the world.

And they have a team that goes out and assists the NTSB investigating the accident and determining, and assists them in getting the facts so that the NTSB can determine the cause.

Now, the pilot or the people on the airplane do not have any such representatives there assisting the determination of the cause of the accident. And so you need to know that the system that is in place, that determines the NTSB cause of an accident, and blames the pilot every time when the pilot is always dead, is one that has the manufacturer there participating in it, but no representatives of the dead pilot.

You need to know that. That is true.

Senator KASSEBAUM. Well, I just wish to say in ending the questioning here that I think that we have obviously seen over the years, whether from automobile manufacturers or aviation manufacturers, that there are many of those manufacturers who wish that flaws could have been recognized and corrected sooner.

Lives have been lost, and that is a sorrow to everybody. But this legislation does not limit damages. It does not limit legal fees.

Mr. HOGAN. I probably surprised even my opponents by saying here that I have really no opposition to this legislation, except for the statute of repose. And instead of an absolute repose, it ought to be just a legal presumption, as the model code, which is being carefully considered by a great team of lawyers in the ABA, suggests, as opposed to an absolute bar which does not allow for the unusual case where the manufacturer is truly responsible for the airplanes out there older than 20 years.

It would be like an elevator. How can you say that an elevator after 10 or 15 or 12 years, that the manufacturer should get off scot-free when the ropes that hold those things up are supposed to last 50 years and be regularly inspected?

Senator KASSEBAUM. I am sorry, I am really not familiar with this case. But the pilot of the Bonanza must have known that these questions had been raised about the Bonanza for some time.

Mr. HOGAN. I cannot answer. He is dead. I never in fact got to meet him while he was alive.

Senator KASSEBAUM. But if a plane has had the problems that you referred to back to the time of Jimmy Stewart's picture, this would frequently be something well known and discussed in the aviation community. It would have been reported, for instance in aviation journals as well.

Obviously, these tests were already ongoing at the time of this accident. It would seem to me that any good pilot, knowing of these concerns, would have either wanted to check back with Beech to find out what he should be doing or else would have been very cautious about flying the plane.

Mr. HOGAN. Well, the answer to that one is easy. You have asked me an easy question. Beech took the position all along, even through my trial, that there was nothing wrong with that airplane, there was nothing wrong with that tail, and pilots just ought to disregard all of the criticisms that have been made.

It was interesting for me to hear for the first time, incidentally, that the FAA and Beech had agreed even while my case was going on to fix the tail. I did not know that. If so it is interesting, because in my case they continued to fight it right up until the end. They never offered a single settlement.

They continued to deny right until the jury verdict came in that they had anything wrong with that airplane. Then when it came in, they went out and fixed all the other airplanes. That is quite a coincidence.

Senator KASSEBAUM. Thank you.

Senator FORD. Mr. Hogan, I have a couple other questions I want to ask you. I apologize, I thought the accident occurred in 1983, but you say the accident occurred, in which you participated, in 1979 and you went to trial in 1983—1985?

Mr. HOGAN. Yes, sir.

Senator FORD. That made the aircraft roughly 25 years old, if I understood you earlier. And it only had 3500 hours on it?

Mr. HOGAN. Airframe hours, that is right.

Senator FORD. Airframe hours?

Mr. HOGAN. The engine gets treated differently in airplanes.

Senator FORD. That is right. You have a 100 hour check and you have to replace them basically at 800 or 900 hours, except the Merlin B or whatever. I am learning a whole lot about airplanes.

Mr. HOGAN. Yes, sir.

Senator FORD. What bothers me is that under your theory that airplane would have been good for another 50 years. That would have made it 75 years old based on the 10,000 hours.

It would seem like to me it would have dry rot before then.

Mr. HOGAN. Well, they are supposed to be inspected. But at the same time——

Senator FORD. They are supposed to be inspected.

Mr. HOGAN. To answer your question, I cannot say that it would be good another 50 years. It would be good another 6500 airframe hours.

Senator FORD. Well, at 3500 hours—I was just adding that on. If it is 25 years old, just adding another two-thirds to it.

Mr. HOGAN. But you see, you are talking about something like the tail falling off the airplane.

Senator FORD. I understand that. I was just trying to get down to some points that you were making, so I can become better informed, because you will give me different answers than others are going to give here today.

Now, there have been a lot of things said in earlier testimony that you get it all but about 20 cents on the dollar, or the system does. Is that correct?

Mr. HOGAN. I will bet you that true. But what they do not tell you is I bet you about 60 cents of that goes to the defense side, goes to the defense lawyers and the defense experts and whatever they do.

They spend it on themselves. I question whether that would be any different under this law.

Senator FORD. Well, let us get just—how does the defense—if the defense wins, does the plaintiff pay them?

Mr. HOGAN. No, if the defense wins the plaintiff goes away empty-handed and has paid for his own court expenses out of his own pocket.

Senator FORD. All right. Say the plaintiff wins; does the plaintiff get about 25 cents on the dollar of that amount that was awarded?

Mr. HOGAN. Okay. The plaintiff has to pay almost uniformly in America—we have a contingent fee system. That means the plaintiff's lawyer only gets paid if he wins the case, and then he is likely to get a third as a fee. And so the plaintiff's lawyer gets paid out of the winnings of the plaintiff.

And in addition to that, there are court costs and things that get paid out of the winnings, like deposition costs.

Senator FORD. So ultimately the plaintiff who received the injury and is the product of your suit would probably get less than you do?

Mr. HOGAN. No, that is not true.

Senator FORD. Well, if you get a third and they only get 20 cents, which you said a while ago, that means that you get 33-1/3 and they only get 20 cents.

Mr. HOGAN. Plaintiff pays the lawyer a third of what the plaintiff grossly recovers. So if the plaintiff gets a dollar, the plaintiff's lawyer gets 33 cents of that.

Senator FORD. Right. And then the plaintiff pays the rest out of their two-thirds.

Mr. HOGAN. The plaintiff gets what is left after case expenses are paid also.

Senator FORD. And you do not refute the 20 cents, based on that?

Mr. HOGAN. I know there was a Rand study involving, I think it was, asbestos claims, and it came up with a similar number. So I do not dispute that that 20 cents going down to the plaintiff is typical. That is probably about right.

There are a lot of ways the system can be improved.

Senator FORD. Presumption, is that what you said?

Mr. HOGAN. A legal presumption.

Senator FORD. That there is less liability or no liability on an aircraft that is over 20 years old?

Mr. HOGAN. Yes, sir, that would say that after 20 years, if the manufacturers had a legal presumption, which is just an evidentiary presumption, that the airplane was not defective, that should be enough.

In other words, that puts a burden of proof for the plaintiff to come in and show why it should be different, as opposed to just having, as you do in many states now, just target the defective product.

Senator FORD. There is a lot of presumptions in Federal law.

Mr. HOGAN. Right.

Senator FORD. You know, look at the black lung claims. If you worked in a mine for 25 years, it is presumed you have black lung and it is up to the other side to prove that you do not have it.

Mr. HOGAN. And this would be a presumption in favor of them, in favor of the defendants.

Senator FORD. The last question: Are you any kin to the golfer?

Mr. HOGAN. No kin. All the Hogans go back to Killarney, Ireland, a fairly small county where we used to take turns murdering Kennedy's and they would murder Hogans. But other than that——

Senator FORD. Well, I did not want to get into any murder here. I was just interested in the golf.

Thank you, Mr. Hogan. I certainly appreciate it.

[The statement and questions and answers follow:]

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

The Association of Trial Lawyers of America strongly opposes S. 473, the "General Aviation Accident Liability Standards Act of 1987."

We respectfully submit that despite its stated purpose, the bill will neither "reduce . . . expenditures related to general aviation accident liability claims or provide more rapid and efficient compensation for individuals harmed in general aviation accidents." Indeed, we believe S. 473 would achieve the precise opposite result. In many cases, it would severely restrict the ability of general aviation disaster victims to obtain any compensation whatsoever for their injuries. Moreover, we believe it would seriously undermine the safety incentives which are built into the present tort system.

S. 473 would supersede any state law regarding matters covered by the bill. All of those matters—tort law issues regarding recovery for harm—historically have been reserved to the states.

It is ironic and misleading that the justification for Federal involvement is what the bill terms the Federal government's "comprehensive system for regulating general aviation." It is ironic because many of the proponents of this legislation are the very folks who have traditionally (and in many cases successfully) opposed tough, comprehensive regulation by the Federal Aviation Administration. These same people are now seeking to hide behind that limited regulation as justification for passing a statute to avoid liability for injuries caused by defective aircraft. It is misleading because while proponents of this bill cite the FAA's responsibility for establishing aircraft design, construction and certification standards and standards for maintenance, inspection and repair, they fail to cite what they know is also true: that the Federal Aviation Act of 1958, by its very terms, specifically requires the agency to set only minimum standards. Minimum standards do not necessarily establish an acceptable level of safety. Quite simply, the Federal regulatory structure as it relates to the general aviation industry does not justify enacting a relaxed liability standard.

To compound the matter, as the U.S. Supreme Court recently noted, the FAA by regulation has authorized the applicant itself to conduct the inspections and tests necessary to determine that an aircraft comports with FAA airworthiness requirements . . . "With fewer than 400 engineers, the FAA obviously cannot complete (the) elaborate compliance review process alone. Accordingly, 49 U.S.C. Sec. 1355 authorized the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assists in the FAA inspection process. 14 CFR Sec. 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development." *U.S.* v. *S.A. Empressa De Viacao Aerea Rio Grandense Varig,* 104 S. Ct. 2755, 2761 (1984)) (See also 14 CFR Secs. 21.33, 21.35 (1983)).

This involves a significant degree of self regulation by the industry. It hardly provides a fair and rational basis for preempting existing state tort standards in favor of a reduced federal liability standard governing actions against manufacturers of general aviation aircraft. The certification of general aviation aircraft involves the F.A.A. and the manufacturer. No consumer has a role in the process. The F.A.A., understaffed as it is, cannot hope to conduct its own tests of new aircraft types. As a result, aircraft are certified when the results of tests performed by the manufacturer are submitted either directly to the F.A.A. or to a designee of the agency.

The regulatory standards which the aircraft must meet are minimums. They are often antiquated. In some instances, the standards are based on technology dating back to the 1940's. There is no governmental incentive for manufacturers to surpass them. There are few marketplace forces for manufacturers to surpass them. The primary incentive to build safe airplanes which meet today's technology is coming from the civil liability system.

ATLA believes that S. 473 would unfairly and without just cause tilt the balance even in meritorious product liability lawsuits in favor of defendants. The bill would make it more difficult for injured victims to prove their case. Imposing a negligence standard (as the bill does in Section (5)(a)) and requiring a victim to prove what only the manufacturer knows or knew or "should have known" about an aircraft (as in (5)(b) (1) and (2)) are very steep hurdles. They may act to prevent recovery by a plaintiff for injuries that in fact are directly attributable to defective products.

Even where negligence is present, it is often very difficult to prove. It is the manufacturer/defendant that controls the evidence relating to state of mind and negligent conduct. But the absence of a negligence standard does not mean we are left with a standard of absolute liability. Under present law, even so-called "strict liability" subjects the injured consumer to a rigorous proof. The plaintiff—even absent a negligence standard—must *prove* that the manufacturer produced a defective aircraft *and* that the defect caused the plaintiff's injury.

Earlier this year, a member of our Association who is familiar with general aviation litigation prepared a letter which summarized a number of ATLA's concerns with the liability standards proposed by this legislation. It is worth quoting from part of that letter here:

"(The Bill) would inject negligence into strict liability doctrine by allowing defendants to evade liability where the product conformed to the "state of the art" as defined by what was reasonably feasible in light of existing technology. Even when a plaintiff could show that an airplane was unreasonably dangerous and defective, that plaintiff would also be required to demonstrate that a reasonable manufacturer would have built or designed the plane differently. This would essentially mean that manufacturers would have a reduced legal obligation to pursue safety innovations and could content themselves with the *status quo*. Additionally, the (bill) would allow the manufacturer to avoid liability where the plaintiff used the aircraft in a manner slightly different than intended by the manufacturer, even though such use was foreseeable and the manufacturer could have reasonably produced a product that would have made such use less dangerous. These defenses would lessen manufacturers' incentives to expend their resources to expand safety."

The "intended purpose" language in Section 5(b)(1)(A) and the notion in 5(b)(1)(C) that in order to establish liability the plaintiff must prove the aircraft "was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured" raises very serious concerns. Among them are concerns regarding crashworthiness. Manufacturers may escape liability—even though they know that aircraft crash—simply because they do not intend that they crash. If a defective condition in the manufacture or design of an aircraft makes it less crashworthy, why should not that defect establish liability? It is wholly foreseeable that a general aviation aircraft may crash, notwithstanding that it is not intended or designed for that purpose.

As long ago as 1929, Lieutenant J.H. Doolittle stated: "a feature to which insufficient attention is given is designing and constructing an airplane so that it crashes well. This sounds odd but many lives have been saved because the cockpit was strong and there was sufficient material between the pilot and the ground to absorb the shock of crashing." While some attention has been paid by manufacturers to crashworthiness in recent years, there are still large numbers of general aviation injuries attributable to aircraft insufficiently designed for crash landings. Clearly, such an event—a crash landing—though foreseeable, is not an intended use and may not be subject to liability under this bill.

The immediate past Chair of ATLA's Aviation Law Section recently represented an individual who lost an eye in a 1978 crash because the manufacturer failed to install shoulder harnesses in the aircraft. Those shoulder harnesses would have made the plane more crashworthy (in this case, they would have prevented the injury) and the manufacturer was aware of that and of the safety benefits of harnesses in general. But at the time of that crash, the F.A.A. did not require the installation of shoulder harnesses and the manufacturer opted against it.

While the liability standards in section 5 of the bill are matters of great concern, so too are the restrictions imposed under section 7. No civil action for harm arising out of a general aviation accident may be brought if the accident involves an aircraft which is more than twenty years old. No matter how compelling an injured victim's case might be, no matter that general aviation aircraft are designed to have (and are marketed as having) a very long useful life, no matter that there are many, many planes more than twenty years old that are still in operation, a manufacturer need only manufacture a plane—even a defective plane—that will fly safely for twenty years and that manufacturer avoids liability entirely under the bill.

Thousands of Beechcraft Bonanzas with the infamous defective V-tail design were produced many years before that aircraft began to come apart in the sky. It would be shameful to excuse from liability the manufacturer of defectively designed aircraft simply because the defect did not manifest itself for many years. Worse, we would be building into the system a disincentive to manufacture a plane that is designed to fly safely for more than twenty years.

The comparative responsibility provisions of the bill (section 6) also are worrisome. The right of an innocent victim to full and fair compensation outweighs the policy desire to fix a defendant's financial exposure at precisely the percentage of damages for which that defendant is proved responsible. In the first place, the trier of fact rarely can fix with any reliability an exact percentage of responsibility. But more importantly, the common law rule of joint and several liability is long held and widely accepted. S. 473 would overturn that rule and in cases involving insolvent or underinsured or otherwise unreachable defendants, would have the effect of imposing the financial burden of a general aviation accident not on the manufacturer or supplier or maintenance person or pilot who caused the accident, as the case may be, but on the innocent victim. Under the common law rule, while liability may be joint among tortfeasors there must be individual responsibility in order to permit recovery. That is, under the widely accepted rule of state law, the defendant's conduct *by itself* must have been sufficient to cause the accident or have been an essential factor in causing the injury. That is not an unfair standard. It is hardly as unfair as forcing the innocent victim to bear the cost of the injury.

We have seen and heard many reasons given for the cost of product liability insurance and the lack of sales of new general aviation aircraft. Members of our Association have repeatedly written to the industry seeking actual data on insurance costs and have never been answered. Nor has that data otherwise been disclosed.

The decline in the demand for general aviation aircraft, we believe, is unrelated to product liability law. Overproduction in the 1970's, the long useful life of aircraft, the very healthy used plane market and subsidized foreign competition are the real causes of the industry's sales problems. If we want a sound general aviation industry in this country, the very last thing we should do is eliminate incentives that operate to make the one we have more safe. Although unwittingly, S. 473 would have that result.

Before revising the aviation tort system, attention should be focused on the standards for safety as promulgated and enforced by the F.A.A. The aviation industry, in combination with many safety groups and insurance companies, has reduced the number of crashes substantially. Unfortunately, there are still aircraft in use which are unsafe and whose defects should be remedied. Standards for safety must be updated to provide passengers and pilots with aircraft that meet the current standards of technology. A quick "fix" to the tort system will not spare lives; it will only spread suffering to those least able to afford it. The real solution is to prevent the injuries in the first place.

THE ASSOCIATION OF
TRIAL LAWYERS OF AMERICA
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ALAN A. PARKER
DIRECTOR OF PUBLIC AFFAIRS

January 7, 1988

Honorable Ernest F. Hollings
Chairman, Committee on Commerce,
 Science and Transportation
503 Dirksen Building
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are responses to your questions of December 21 regarding S. 473, the General Aviation Liability Standards Act. We appreciate the continuing opportunity to contribute to the record.

If I might, I would like to clarify ATLA's position regarding a portion of R. Ben Hogan's December 3 testimony before the Aviation Subcommittee. Mr. Hogan indicated that except for the twenty-year time limitation on liability contained in section 7 of the bill, S. 473 is essentially an acceptable proposal. That is not the position of the Association of Trial Lawyers of America. ATLA has substantial concerns about other provisions of the bill and in principle opposes federal limitation of an injured victim's right to pursue state tort remedies.

ATLA's views are spelled out clearly in the eight-page statement we submitted for the record on December 3 and I would ask that you and the Members of the Committee view that as our official position regarding S. 473.

Again, thank you for the opportunity to participate in your deliberations.

Sincerely,
Alan A. Parker
Alan A. Parker
Director of Public Affairs

AAP:plw

Questions and Answers for Senator Hollings

1) What are your views on the jurisdictional provisions of this bill, which seem to be somewhat unusual. The bill provides for federal district court jurisdiction, concurrent with state courts, and an absolute right of removal to federal court by any defendant sued in state court. Do you forsee any problems or possibilities for abuse, such as widespread forum shopping, arising from this jurisdictional provision?

> As you suggest, the jurisdictional provisions in section 13 of the bill are highly unorthodox. Moreover, in practice we believe they would further restrict the rights of passengers injured by defective aircraft.
>
> We believe the proposed changes in liability standards would give to manufacturers an enhanced and unfair substantive advantage over injured victims. The section 13 jurisdictional provision - providing to those same manufacturer/defendants the absolute and unilateral right to remove a case "without the consent of any other party and without regard to the amount in controversy" - would compound the substantive imbalance by adding an unwarranted procedural advantage.
>
> In some parts of the country, federal district court dockets are severely backlogged. In a large number of those jurisdictions, the same case pending in state court would be reached for trial far more quickly. The section 13 provision, among other things, would permit a defendant to remove a case to federal court for no purpose other than delay, an abuse which would impose a further financial and emotional burden on the families of innocent victims.
>
> Beyond the problems raised by deliberate delay and otherwise abusive forum shopping, section 13 raises national policy implications which need to be carefully considered by the Congress. With no evidence that state courts are unable to handle and process these cases, is it sound policy to add a new basis of federal court jurisdiction, where none now exists, without at the same time providing significant new federal budgetary resources to the judiciary? Particularly, is it responsible to do so when the jurisdictional basis may be imposed in the sole discretion of a defendant "without the consent of any other party and without regard to the amount in controversy?"

2. Increased uniformity in liability law is often cited as one of the benefits of federal legislation in this area. However, it seems to me that this bill could decrease, rather than increase, uniformity in liability law. Fifty state courts, as well as all federal district courts, could be deciding cases applying this law. What is your view of the effect of this concurrent jurisdiction on consistency in the law?

> We believe your suspicion is absolutely correct. An irony associated with this bill - as it is with virtually every so-called "uniform" federal liability proposal - is that it would decrease, not increase, uniformity. By establishing new and sometimes novel standards, by preempting well developed common law in all parts of the country and by granting jurisdiction concurrently in the federal system and in the courts of each of the fifty states, the bill would engender rather than eliminate uncertainty and confusion. Preemptive federal standards would disturb already well established law and would, in effect, require each state court to begin again, anew. It strains credibility to believe that each interpretation of the new law and each application of the law by a state or federal court would be consistent or "uniform" with what would be happening, independently, in fifty other court systems around the country. If anything, there would be far less predictability than under the settled law and interpretations of today.
>
> Additionally, those who argue that we need uniformity ignore the fact that section 402(a) of the Restatement of Torts, 2d, is already the law in 46 states.

Senator FORD. We have one witness left, with a lot of tenacity and patience, Jonathon Howe, President of the National Business Aircraft Association.

I understand that Mr. Yodice general counsel for the Aircraft Owners and Pilots, had a 12:30 flight and had to leave about an hour sooner. I am sorry that we missed his testimony, but his statement will be included in the record.

Mr. Howe, we are delighted to have you. Sorry you waited so long, but we appreciate your patience, and you may proceed.

STATEMENT OF JONATHON HOWE, PRESIDENT, NATIONAL BUSINESS AIRCRAFT ASSOCIATION

Mr. HOWE. Thank you very much, Senator Ford. I truly appreciate the opportunity to be here.

Recognizing the time constraints, I thought I would simply confine my testimony to three I think very critical points. Let me first of all say at the outset, though, that I am here in I suppose the happy and perhaps somewhat unusual position of representing the entire spectrum of aviation users.

In fact, I have been authorized to speak for not only my friends and colleagues at AOPA, but all of the other aviation users. And I think one of the significant things here is that there is total unanimity on the part of the aircraft users and aircraft operators throughout this country as to the need for this legislation.

We do not have an axe to grind with respect to either the manufacturers' side or the plaintiffs' bar side. I think we are truly the stakeholders in this particular case. And thus I am appearing here and the points I want to make are not points that I believe necessarily favor either side, but I think are very, very important parts of the equation that you should have before you.

First of all, the real consumers in this particular situation are in fact the aircraft operators. This bill does not apply to passengers on airlines, it does not apply to people on the ground, it does not apply to non-aviation types of consumers.

So thus, when somebody purports to speak in behalf of consumers, we in fact are the consumers. And there are some significant impacts of the current system, not only from an economic standpoint but from a safety standpoint. And let me just make the three points.

First of all, necessarily, as users of these aircraft, we want the finest quality, the safest products, the most innovative products, the state of the art. Obviously, we would like to pay as little as possible for those, but price is not the compelling factor. Price obviously is a factor. But what we truly want is state of the art modern products.

What we see happening with the figures that we have heard—50 percent of the cost of an aircraft, the decline in the manufacture of the aircraft, the decline in the manufacture of the parts for those aircraft.

Senator FORD. That was 50 percent of a small aircraft.

Mr. HOWE. That is correct, Senator.

What we see happening is the demise of an industry, and with the demise of that industry, why, we clearly would not have a product at any price. So that we see not only with the demise of that industry, the demise of our industries as well.

So not only do we pay the costs, but we suffer the penalties, if you will, of an industry that is in deep, deep trouble.

Now let me turn to what I consider to be two very critical safety issues, and I think these are things that have not been stressed. One area I would go back—as I think you know, I spent many years with the Federal Aviation Administration, and much of that time, some of that time at least, was spent chasing down manufacturers of what we used to call bogus parts.

And one of the things that we found with the manufacturer of bogus parts, the reason that there was such a proliferation of bogus parts out there was because the people that produced these parts did not have to produce them to any type of standards.

They had no accountability, and therefore they were able to price these parts far, far below the price of the original equipment manufactured parts, the parts that were certified and approved by the Federal government, and were subject to the rigorous testing that the manufacturer was required to do.

Now, obviously, since the manufacturer's liability exposure was the same for his parts as they are for the assembled aircraft, the price of those parts went up commensurately, as we see from the charts over here, as did the finished product.

So not only do we have a problem with very expensive parts, but we also have a problem of availability of parts, because just as the number of airplanes went down, so in many cases did the availability, at least on a timely basis, of parts.

So what happens? This encourages these bandits out there. And I am sure you are familiar. The records are full of the numbers of bogus parts that have found their way into our aviation system.

There is a clear and present hazard of those types of parts, and this type of a system encourages people, in some cases unaware, in some cases aware, obviously, to go out and obtain unsafe, uncertificated, unapproved parts.

So we think there is a safety issue involved here that really needs to be addressed. The other safety problem, and it was touched on, I think, by a couple of the previous speakers, and I think Congressman Glickman also touched on it.

But I would like to emphasize this from the standpoint of the user. And that is that as the manufacturer has this continual exposure to product liability cost, it discourages experimentation, it discourages innovation.

Because there is risk associated with coming out with a new product or a refined product or a change in a product, which may indicate that either he felt that there was something that needed to be improved on the product, or maybe he simply wants to risk some innovation.

This discourages him doing that. There is much more likelihood that the manufacturer is going to stay with something where he can reduce his exposure.

Well, obviously, this does a couple of things. First of all, it means we are not going to take advantage of some of the state-of-the-art out there. We are going to operate with technologies made 20 years ago as opposed to today's technologies.

Secondly, it encourages more older airplanes. You have heard testimony, it is in our testimony and I think a number of the others, that the age of the general aviation fleet today exceeds an average of 20 years.

Well, anybody can figure out that the older the airplane gets, it does not necessarily mean it gets unsafe, but the older the airplane gets the more attention it needs, the more exposure it has, and that in and of itself can become a problem.

And as long as we discourage innovation, as long as we discourage state-of-the-art types of equipment by this type of situation, we are going to get older and older airplanes, and we are going to get less modernization.

I think those are the three key points, Senator, that need to be made with respect to the users of the aircraft. We obviously want the best possible product from the manufacturer.

We are not against a system that holds manufacturers accountable. I would say, however, that unlike many other areas, and I think Congressman Glickman testified to this very eloquently, there is a very elaborate Federal regulatory system that, completely independent of the tort liability system, holds the manufacturers to a very, very high degree of accountability.

And incidentally, that is never subject to the statute of repose. Thank you very much.

[The statement and questions and answers follow:]

STATEMENT OF JONATHAN HOWE. PRESIDENT, THE NATIONAL BUSINESS AIRCRAFT ASSOCIATION, INC.

Mr. Chairman and Members of the Committee:

Thank you for allowing me to appear before you today. I am Jonathan Howe. President of the National Business Aircraft Association Inc. (NBAA). The NBAA represents the aviation interests of American business. Business aviation is the largest single specialized segment of general aviation, that portion of civil aviation exclusive of scheduled air carriers. Our 2900 member companies. operating some 5500 aircraft of all types and consisting of some of the nation's largest--and smallest--companies. depend on aviation to help them meet their daily business transportation needs. Our members are vitally interested in the safe' efficient and productive use of their aircraft as a tool of commerce. As they are the "ultimate consumers" of general aviation goods and services, unlike others who may come before this panel, the issue of reforming the tort treatment of claims arising from general aviation accidents is of great concern to them. Consequently, we lend our full support, and that of our membership, to enactment of S. 473. the General Aviation Accident Liability Standards Act introduced by Senator Nancy Kassebaum and co-sponsored by you and a number of your colleagues.

The support by our member companies of legislation reforming the treatment of general aviation tort liability may come as a surprise to this subcommittee. Traditionally, consumers are thought of as opposing any infringement of their ability to seek legal remedies arising from a manufacturer's failure to foresee accidents arising from the use of a product. In the case of reforming the tort treatment of claims arising from general aviation accidents, business aircraft operators are all too keenly aware of the stifling effect the current tort liability climate has had on the ability of general aviation manufacturers to make available products incorporating the state of the art in technology, much less more traditional ones. Indeed. the most devastating effects have been on the lower end of the general aviation aircraft spectrum, that involving single- and twin-engine airplanes powered by piston engines. for years the "backbone" of the industry.

Of course, much of the opposition to legislation such as S. 473 comes from "traditional consumers." Please understand that these organizations, however well they may represent the average consumer, do not represent the general aviation consumer. Indeed, the average consumer's only exposure to aviation, much less general aviation. is to travel aboard a scheduled air carrier flight for business or personal reasons. Thus, it is vital that the Subcommittee understand that the legislation we are here to discuss today does not affect airline passengers. Language included in the measure makes specific its exclusion of applicability in the case of claims brought by a passenger aboard a scheduled air carrier flight. In fact, it could be said of this legislation that those supporting it are the only ones who could possibly be adversely affected. Conversely, the members of those consumer groups opposing it would be unaffected. With these distinctions in mind, allow me to present business aviation's view of the general aviation tort liability crisis.

THE NEED FOR GENERAL AVIATION TORT REFORM

In 1978, domestic general aviation manufacturers delivered almost 18,000 new aircraft. In 1986, that number was reduced to a mere 1495, while this year, manufacturers will be fortunate to sell 1000 new aircraft. To be sure. many factors have had an impact on the depression of the industry. Chief among them, however, is the "explosion" in lawsuits brought against manufacturers and the seemingly huge awards handed down to plaintiffs in recent years. The effect has been staggering. The unemployment rate in general aviation is approximately 70%. The average age of a general aviation aircraft is more than 20 years. In 1985, the cost to manufacturers averaged $70.000 for each new aircraft sold. This cost, which is inevitably passed on to the purchaser of a new aircraft, has assuredly risen since that time. With the exception of the larger, more powerful business jets and turboprops, very few new models are being brought to market. Those new models that manufacturers are introducing are but updates of older, more traditional ones. Herein lies the root of business aviation's suPport of general aviation tort liability reform.

No industry can survive in today's economy without innovation and product development. Unfortunately' the innovation and development of new general aviation products has been stifled by the overwhelming risk of exposure to plaintiffs' claims that previous technologies are somehow defective. This has resulted in general aviation aircraft manufacturing that has not made rapid innovation in the years since World War II. This is in contrast to recent strides made in materials and manufacturing techniques which have been incorporated into other manufacturing industries in recent years.

Our member companies are justifiably concerned that the Products offered it now and in the future do not represent the state-of-the-art. They are also concerned that new aircraft will not be as efficient nor productive as is technologically possible and that a substantial portion of the product's purchase price has nothing to do with the cost of manufacturing the product but with insuring the manufacturer against its exposure for aircraft produced decades ago. Aviation consumers are as price-sensitive as are other types of consumers. The artificial inflation of the price of new aircraft, due to astronomical product liability, has forced aviation consumers to forego purchase of a new aircraft.

They are concerned that the cost of maintaining and repairing the aircraft they already own and operate is far in excess of what it should be. Finally, they are concerned that there may not be a domestic general aviation manufacturing industry from which to purchase new aircraft, whatever innovation they may incorporate, unless substantial reform of general aviation tort liability is forthcoming.

For these reasons, and others too numerous to include today, business aviation has lent its full support to general aviation tort reform.

THE LEGISLATION

A brief discussion of the legislation before you is in order, if only to set straight what may have become a somewhat convoluted record of the bill's provisions.

What S. 473 Will Do

The primary feature of S. 473, and one of the most urgently-needed reforms in the area of general aviation tort liability, is the provision giving original jurisdiction in a general aviation accident to U.S. District courts, even if the action is first brought in a State court. Such a Provision is eminently sensible--aviation is, by its nature, an activity which crosses State boundaries. More importantly, however, aviation is regulated, top to bottom, by the Federal government. The Federal government, through the FAA, is responsible for regulating the initial design and continuing airworthiness of all civil aircraft, licenses and polices airmen and provides air traffic control and navigation facilities and services. Why then, does the current system depend upon a "patchwork" of varying, often contradictory, State laws and court decisions? This is an area which demands rectification and S. 473 would provide it.

Another feature of the legislation is inclusion of provisions regarding the several liability of manufacturers if a manufacturer's product is found to be defective. Under current practice, a manufacturer who is but 10% liable for damages arising from an accident can be 100% financially responsible if, for example, another manufacturer is out of business at the time the decision is rendered, a real possibility. By mandating that a manufacturer's liability is limited to its proportionate share of responsibility for the plaintiff's damages, the legislation would inject a measure of fairness where none currently exists.

These and the many other features which are included in the measure and which would not materially affect a plaintiff make it attractive to business aviation. By injecting some fairness and reason into this process, costs to manufacturers and aviation consumers alike may be reduced and only those who are truly liable for harm arising from a general aviation accident would be held responsible.

What S. 473 Will Not Do

As significant as these provisions are, what is perhaps more significant is what this legislation would not do. For example:

—S. 473 would not "cap" attorneys' fees nor awards;

—The legislation would not affect other types of tort actions, including those involving airline passengers or non-aviation consumers;

—It does not preclude consideration of lost earnings claims at trial; and

—It would not hold liable non-manufacturers' such as flight instructors, air traffic controllers and fixed-base operators for actions other than their own.

These. and other. provisions which uniquely affect general aviation alone make this measure highly desirable not only from the perspective of business aviation but also from that of public policy. Many industries and manufacturers are clamoring for relief from this nation's poorly-defined process of awarding damages to parties injured by a manufacturer's negligence. A great deal of finger-pointing has occurred. while no substantive remedial actions have been taken on a national scope. This legislation offers if you will. a "test" case which could provide substantial information on the extent to which the product liability "crisis" decried by many is the result of an over-litigious society, over-estimation of exposure by insurance companies. disregard of a product's potential harm by a manufacturer or a combination of the three. We urge its enactment.

CONCLUSION

We sincerely appreciate the opportunity to appear before you to discuss this measure and the favorable impact it would have on aviation consumers and, especially, business aviation. While we are fully aware of the emotional, divisive nature of this subject, we urge this Subcommittee to take full cognizance of the industry-wide support of this measure, the urgent need for it and the total lack of any impact on general consumers. We are confident that, having considered these factors, You will see fit to act favorably on S. 473.

Thank You.

JONATHAN HOWE
President

**NATIONAL
BUSINESS AIRCRAFT
ASSOCIATION, INC.**

1200 Eighteenth Street NW
Washington, DC 20036

202/783-9000

January 14, 1988

Honorable Ernest F. Hollings
Chairman-Committee on Commerce
  Science and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in reply to your letter of December 21, 1987, requesting the National Business Aircraft Association (NBAA) to answer some additional questions for the record of recent hearings on S.473 to assist you in your consideration of that legislation.

Question 1 It has been suggested that S.473 is warranted because the general aviation industry is already heavily regulated by the federal government. However, FAA regulations, particularly as they related to safety, are considered to be minimum requirements. Are you satisfied that compliance by manufacturers with these FAA standards adequately protects the safety of your members as well as other users of the planes?

Answer The membership of the National Business Aircraft Association (NBAA) are completely satisfied that compliance by manufacturers with FAA standards adequately protects them and other users of airplanes certificated by FAA. Our members are well aware of the accident and incident record of both Part 23 and Part 25 aircraft, as evidenced by the NTSB. We also review foreign accident and incident reports.

FAA standards are well above the so called "minimums" that they have been characterized as by opponents of this legislation. The NBAA knows (and I personally know as a former FAA official) that the FAA standards are the result of exhaustive public comment and input and we, the users and operators of aircraft built according to these standards, actively participate in these meetings. The FAA standards are, in fact, a reasonable balance between economics and safety needs. We are also aware that the Federal Aviation Act uses the term "minimum standards" only when qualified by the words "as may be required in the interest of safety" or "necessary for safety". The qualifier ensures a standard far above that which anyone could reasonably call just "minimum".

Another point that seems to have been overlooked by others is that while the FAA standards change over the years as technology permits, the standards used for certification of any particular airplane production are not required to be changed during the production life of that aircraft except in response to safety needs. Some characterize this as permitting production of aircraft produced to antiquated standards. Our members see it differently - we consider these to be aircraft with proven safety records.

The anticipated level of safety expected from the newest standards used to certify the latest design is always higher than the current airplane safety standards. But, it is anticipated, not know with certainty. Because of all the long-standing FAA requirements on reporting of system malfunctions and failures, the information obtained from NTSB accident and incident reports and the manufacturers and FAA trend monitoring programs, the information as to what needs to be changed to correct perceived design or manufacturing defects is readily available. Through manufacturer service bulletins and FAA airworthiness directives, necessary changes are made.

Question 2 Your support of this bill is based in part on the hope that it will reduce liability costs, and, I assume, that those reductions will be passed on to the consumer. What evidence or assurance do you have that the manufacturers will pass such savings on to the purchasers of the aircraft?

Answer NBAA's support for this bill is based on our view that it will remove the excesses from the current liability system, place responsibility more on those individuals responsible for the accidents and will, in fact, reduce the costs of new airplanes and spare parts for older aircraft. The present system results in windfall recoveries to a few injured parties and inordinate fees for their attorneys, expert witnesses and investigators. It removes the incentive for pilots and those who service and maintain aircraft to be responsible for their own actions. Though we have no specific indication (other than our discussions with the manufacturers) that savings will be passed on to purchasers of aircraft, in this very competitive business we are confident that product liability cost savings will be passed on to the purchasers of the aircraft.

Question 3 Your testimony expressed concern about the decline in the number of general aviation aircraft being manufactured. Do you see this bill, then, primarily as an effort to revive a flagging industry?

Answer We do not see this bill primarily as an effort to revive a flagging industry. We see it as a means to redress the excesses in our current product liability law. We expect that federal jurisdiction and federal law governing the product liability of general aviation aircraft will eliminate the differences in state law that sometimes dictate inadequate or no compensation to innocent victims of accidents and grossly excessive recoveries to others. We believe that this bill will result in manufacturers being able to continue to produce aircraft and aircraft parts so that we, as operators of aircraft, are able to afford to buy new aircraft and spare parts for currently owned aircraft at reasonable prices. If the excesses of the current product liability system continue, we recognize that spare parts, particularly, will become unavailable and we will be forced to rely upon the "junkyards" and "backyard manufacturers" of parts with unknown levels of safety.

In summary, we believe that S. 473 will substantially enhance the safety of design, construction, operation, maintenance, and repair of aircraft, at costs our members can afford.

We appreciate the opportunity to respond to your questions.

Sincerely,

Jonathan Howe

Jonathan Howe
President

Senator FORD. Fine, Mr. Howe. You did this very well. I have got just a couple of questions. Since you are in between, and independent, and clear-thinking and that sort of thing, I want to try something on you.

Mr. Hogan made a very interesting proposal. I say it is interesting, I am not saying I am for it. But it is something that kind of came, and the light turned on a little bit. And that was presumption.

As I say, we have used that in many pieces of Federal legislation. And he said he was not against this legislation. It was the statute of repose, that it was presumed that the manufacturer would be exempt, if the aircraft was at a certain age.

I also listened to Mr. Martin a little bit when he said that, if they installed an engine, that the statute would kick in again, as it related to the engine, and all that.

Do you have any thoughts as it relates to changing this legislation to put presumption in it, and not have a definite time?

Mr. HOWE. Well, I think the whole notion of a statute of repose is that there comes a point, and I think that perhaps presumption may be the way to address it.

There is a point in time when it simply becomes unreasonable to go out and, for instance, take an old Twin Beech that was manufactured back in the 1930s with a technology that was available at that time.

The manufacturer no longer manufacturers that airplane. He cannot really be held accountable today for something he did not know when they designed that airplane 30 years ago. And I think under today's system he is.

And I think the notion here is that if you can show that he should have known back then, or that there was some reasonable basis that he did not meet his responsibilities back then, then that would override the statute of repose, and we think that certainly would be appropriate.

But I think the burden would have to be on the plaintiff in that particular case to show that there was some duty on his part to have known about it back then.

Senator FORD. I think Mr. Hogan made that point, that he said it put greater weight on the plaintiff's representation in order to prove that. And that made it harder to get to the manufacturer.

You know, I come from Kentucky, the home of Henry Clay. And he was a great compromiser. Of course, you can say other things about him too. But the great compromiser is what I wanted to interject into this hearing.

You talked about the standards that were set, and your background and experience by FAA on the manufacturer for detail. And that is eliminating new experiments, new technology, fearful of getting in because of the liability.

A lot of things pop into your mind in these places when you are listening, and that is one reason I think debate on the Senate floor is good, rather than sitting around in your office watching it on TV.

How does FDA handle a new vaccine or a new medicine to let it come on the market, or to let you start with experiments? Do they absolve any of the manufacturers of any liability as it relates?

Or do they sign up the human guinea pigs and pay them so much money, and they have a hold harmless clause or something? How does that work?

Mr. HOWE. Well, I certainly do not profess to be an expert in that.

Senator FORD. I am not either. And I do not know. I am just trying to figure out how we might get around this problem.

Mr. HOWE. I believe that the process there, which is an unusual one, is that most new prescription medicines are subject to a fairly elaborate testing period prior to going out to the marketplace, so that before they go out to the marketplace they are subjected to that type of scrutiny.

Senator FORD. But with the AIDS vaccine, they have allowed them to start experimentation on humans. And there ought to be some kind of protection, or they would not be going to FDA, making this request.

Mr. HOWE. I think there is a pretty good analogy actually, now that I think about it. Particularly between the pharmaceuticals and the aircraft manufacturing industry, because think of it this way.

There is an elaborate testing requirement, so that the FDA satisfies itself, not perfectly because nothing is perfect, but substantially that this is a safe product before they turn it loose.

Now, once they turn it loose, the manufacturer is accountable for any negligence, any problems associated with that. And nobody is suggesting that the manufacturer be let off.

We certainly are not in favor of absolving anybody of genuine negligence. And I think Mr. Sontag clearly indicated that he had no difficulty with paying his just obligations. And certainly that is the case.

But I think the analogy with the drugs and the airplane is very similar. Because an aircraft, the certification process of an aircraft is one of the most time-consuming, one of the most detailed, one of the most highly-scrutinized processes that are followed, I think, in any technology.

I have been deeply involved in that for the last quarter of a century. And from the time of original design to the time that airplane is delivered to the customer is in many cases as much as five years. And the amount of testing that takes place is extraordinary.

The other thing that I think is in fact unique to the aviation industry is that even once that airplane gets out in the field, the service of that airplane is subject to constant scrutiny by the FAA. And through the air worthiness directive technique.

And we heard some testimony about that before. That is a means that the FAA can go out and, say, an airplane that is 50 years old, there is no statute of limitations, no statute of repose there, they go out and say, put that airplane on the ground.

I had the dubious distinction when I was deputy chief counsel of signing the order that grounded the DC-10. And you may recall that that was, I think, one of the more spectacular examples of taking a questionable product at a particular point in time—it certainly later turned out to be a fine product—but at a point in time there was doubt, the airplane was put on the ground.

The Federal government has tremendous power to do that type of thing, and I think everybody would agree that that is an appropriate thing. So there are tremendous safeguards built into the system.

Senator FORD. On the DC-10, did that decision not come after an accident?

Mr. HOWE. It did, it did. That is correct.

Senator FORD. I am trying awful hard to find a way here to accommodate the trial lawyers, who are my friends, the airline industry, who are my friends, like you. And I am trying to stay in the middle. And when you get in the middle, Confucius has some things to say about that.

But maybe I ought to ask Mr. Martin this, and he can give me an answer. Mr. Martin, you said that the average cost per airplane was $70,000, and that was factored in for your insurance?

Mr. MARTIN. Yes, sir. I did say that.

Senator FORD. That a small aircraft, you could almost reduce it by half. And then I understood you to say that your manufacturing now was away from general aviation and going into specialty, where you would design an aircraft for some major company.

Now, is that $70,000 figured into that large aircraft, that jet? Is that $70,000 just for that one also? The average is $70,000?

Mr. MARTIN. The average is $70,000 per unit. And it does not make any difference whether it is a corporate jet or a smaller airplane.

Senator FORD. The small aircraft is tens of thousands, where the corporate jet is millions. Dollar-wise, do you think it is appropriate to put the $70,000 per unit on it?

Or you should take it as an average, as the cost of the aircraft, and put the $70,000 into the millions, and maybe something less or something more than $70,000 into that one?

I am talking about getting the dollar average, rather than making it look like, if I wanted to buy a $200,000 aircraft, $70,000 of that was for insurance. Otherwise, I could get it for $130,000.

The difference between $130,000 and several million is—I have looked at these aircrafts that have been purchased for $10 million. And when you go inside and you push a button, the bed falls down. It is a pretty good piece of machinery.

Mr. MARTIN. Well, sir, we do not make any of those airplanes. The highest price airplane we make is about a $3.5 million jet.

The right way to figure it produces about the $70,000 figure, and the right way to figure it is this. The larger airplanes, like the turboprops and the jets, are more costly units, and they carry more people.

And an accident, when it does occur, and liability is imposed, is probably more expensive. It is more expensive. But they are professionally flown. Full-time pilots fly them, almost without exception. And their accident rate is way below the small owner-flown airplane.

Now, if you take the figures and you attribute to the Bonanza class of airplanes its product liability cost, then you come up with a figure at about the $70,000.

Senator FORD. So the safety level at the $3.5 million offsets——

Mr. MARTIN. Higher cost. And the safety arising from the difference in the competence of the pilots.

Senator FORD. Well, in 1956 I flew better than 300,000 commercial hours. I got a little plaque that I went over 300,000 commercial hours in 1956.

I campaigned for lieutenant governor, for governor, and for Senator three times. And I want you to know that I have had some right interesting landings in that period of time. And I have been able to walk away from all of them. And I am thankful.

Somehow or another, I feel like my odds are getting a little bit closer. Where they used to be 10 to one they would now be down to two to one. I worry about the safety, and I fly with friends. And I fly with people that I think are competent and keep their aircraft in good condition. So far that has paid off.

Mr. HOWE. Senator, if I can make an observation. I think your odds are better, if you figure you have got all the unsafe years. If you look at that chart behind you, now you are in the safe years.

Senator FORD. That may be true. But your average is going to play out on you one of these days. And I am just saying that I have observed, since deregulation, we have fewer flights, as it relates to medium-sized towns of 50,000 average.

So I am going to my general aviation use considerably. And when you are in Kentucky, you do not fly a hot one to land at Hazard or Harlan. They have got pretty good airstrips. And they are building new ones.

But when you fly into a mountain and it is all rock, and right down at the bottom of it is a cemetery, you pucker a little bit until he gets all three wheels on the ground. So I have got a real interest personally, and my job here in the Senate.

And I am trying to accommodate everybody. I think Mr. Hogan made a good point with presumption. It may not satisfy you, Mr. Martin, but I am sure going to look at it.

Mr. MARTIN. Well, if it is done right, I do not know that I would disagree with Mr. Hogan. Now, I am speaking for myself. And I think there may be a ground to work on there. But it has to be done right.

Senator FORD. I would hope so, because Mr. Hogan was here representing the American Trial Lawyers. He was here representing them, I suspect, based on his experience with you.

He has done a pretty good job with that, apparently. So maybe it was the trial lawyers making a suggestion and you saying personally you might accept that. We may just find us a bill that will fly.

Mr. MARTIN. I do not know that my view of how the presumption ought to be worded and his are the same. But the concept is not one that I would reject out of hand, by any means.

Senator FORD. I find that when you agree upon the concept, you can usually find language that will fit within it.

Mr. MARTIN. And I might also say that Mr. Hogan is the first of the American Trial Lawyers Association lawyers who has been willing to say we do not have other problems with other parts of the bill.

We have been stonewalled for a couple of years. And I am not criticizing, I am just stating a fact. And if Mr. Hogan and some of his colleagues can bring themselves to sit down with us, we might be able to solve that statute of repose problem, and not solve it in a way that is unfair.

Senator FORD. Well, if we can do this, I think we have moved a long way. I have tried to work out things before, and there has been a lot of stonewalling on every side.

And that behooves somebody that is not as knowledgable of the industries, the two that are stonewalling each other, to make a decision. And so we make the decision and we do it the best we can, with advice and counsel of people like you who have been here testifying today.

With that input, I think we have made some progress. I do not know about you gentlemen and ladies, but I am getting hungry. And I am going to leave this hearing open for roughly 10 days, two weeks, for any additional comment that we might make.

Mr. Hogan and Mr. Martin might get together and, say they issue a paper here that might start us on the way. Not for public consumption maybe, but for the consumption of the Senators on this Committee, we might then move forward.

Mr. Howe, you have played a valuable role here today, and I compliment you on that.

Mr. HOWE. I appreciate that.

Mr. MARTIN. Senator, Mr. Hogan I think does not quite understand the role of Travel Air Insurance Company. It is not a right pocket to left pocket operation.

And could I furnish you, with a copy to Mr. Hogan, the facts with respect to that?

Senator FORD. And I would also like to know who you buy your reinsurance from. Whether it is domestic or foreign, and what percentage.

I would just like to have, how about a financial statement of Travel Air or whatever it is. And then your documentation of the company. I have some knowledge of the insurance business, Mr. Martin.

[Whereupon, at 12:43 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF JOHN S. YODICE, GENERAL COUNSEL, AIRCRAFT OWNERS AND PILOTS ASSOCIATION

My name is John Yodice, and I am General Counsel to the Aircraft Owners and Pilots Association. We appreciate the opportunity to appear before you in support of S.473, the General Aviation Accident Liability Standards Act of 1987.

This bill is identical to legislation reported out of your full Committee in the last session, and similar to legislation being considered on the House side. So, we have expressed these same views to you at an earlier time, and to other committees, most recently to the Subcommittee on Aviation of the House Committee on Public Works and Transportation on September 29th of this year.

The Aircraft Owners and Pilots Association is a nationwide non-profit membership association of some 260,000 individual aircraft owners and pilots. We estimate that our members own approximately two-thirds of the active general aviation aircraft in the United States, and do seventy-five percent of the flying.

AOPA is essentially a consumer organization. Our members have interests on both sides of the product liability debate.

On the one hand, we are the probable victims of any air crashes which are due to defective general aviation products. As such we have an interest in ensuring that there be a fair compensation system for persons so damaged.

On the other hand, we have an interest in the availability, at reasonable cost, of general aviation products. It is apparent to us that many manufacturers and suppliers are curtailing production and even getting out of the general aviation business principally due to product liability concerns. Furthermore, we are very much aware that we pay the product liability costs in the prices of the aviation products that we purchase.

In 1986 there were only some 1,500 new aircraft sold in the United States. This is a drop from some 17,000 sold in 1979. At the same time, according to the manufacturers, product liability costs rose from $24 million in 1977 to $209 million in 1985. This year they expect the number of new aircraft sold to continue to decline, and the product liability costs to continue to increase.

More ominous to the health of the general aviation community is the fact that presently there are no training airplanes being made in the United States. Cessna aircraft, the world's largest general aviation manufacturer, has suspended production of all piston engine aircraft. Piper and Beech, other leaders in the industry, each are producing a limited line of single engine aircraft, most selling for well over six digits.

We have heard a good deal of discussion about whether there really is a problem, and if so, who is to blame. There has been a good deal of finger-pointing: "avaricious plaintiffs' attorneys," "profit-hungry insurance companies," "uncaring manufacturers of lousy products," and the like. To the consumer, this finger-pointing exercise is irrelevant. If the manufacturers perceive a problem and begin withdrawing from the manufacture of aviation products, if new entrants are deterred from the market place because of a perceived problem, if insurance companies are unwilling to write coverages or must charge premiums too expensive for the manufacturers because of a perceived problem, then it is not important whether the problem is real. The perception is real. And the unavailability of aviation products is real.

With respect to costs, we have been made aware that our system for compensating victims is very inefficient, giving the victim or his survivors very little of the money paid into the system. Most of the money is absorbed by the system in the costs of prosecution and defense. Since the consumers ultimately pay the cost of the system, to the extent that we can help make the system more efficient, we should benefit from lower prices.

It is this interest in cost and availability which distinguishes us from the other "consumer groups", which include the broad based public interest groups, labor unions, and the organized plaintiffs' bar. These groups are interested in the broad subject of product liability and tort reform, but they evidence little, if any, concern about general aviation or its problems. Specifically, and importantly, they are never heard to complain of cost or availability of aviation products. We share their concern for the rights of victims. We regret their narrow focus on this concern to the complete derogation of the other concerns of general aviation consumers.

And, AOPA is not alone in its views. There are other aviation associations which, to varying extents, may properly be considered to represent the interest of consumers. There is the Experimental Aircraft Association, the National Aeronautic Association, the National Business Aircraft Association, the National Agricultural Aviation Association, the National Air Transportation Association, the Helicopter Association International. Each of these organizations, I believe, shares the views I am expressing to you. They, along with the General Aviation Manufacturers Association, have combined to form a Coalition For General Aviation Liability Reform to support the Federal legislation such as S.473. They, too, distinguish themselves from the other consumer groups who have little concern for the health of the general aviation community, or the cost and availability of general aviation products.

In defining the interests of our members, we, of course, have relied heavily on the views of our members. (The only dissenting views have been from some of our members who are plaintiffs' attorneys) But, in building on the views expressed by our members, we have acted as a catalyst in providing a forum for the expression of the views of all interested aviation segments. In April of 1986, AOPA conducted a product liability symposium which solicited these views. In May of this year AOPA conducted a parts availability seminar, which, though not specifically directed, quickly focused on product liability concerns as a root cause of the burgeoning parts problem.

The general consensus of these sessions seemed to be that it is appropriate to consider Federal legislation confined only to general aviation. Federal legislation is appropriate because aviation is an activity which is already intensely regulated at the Federal level with very little regulation at the local level. General aviation, at the Federal level, is probably the most intensely regulated of any private activity in this country. Every aircraft is certificated, maintained and operated to Federal standards. Every pilot is trained, certificated and operates to Federal standards. The Federal government regulates the navigable airspace and operates the air traffic control system. The Federal government investigates aircraft accidents, determines their causes, and makes safety recommendations based on these investigations. It's a short step to have Federal law control liability arising out of general aviation accidents.

And, the consensus to confine the legislation to general aviation seemed to be because the prospects are better for such legislation than for more generalized tort reform.

In approaching reform we, as a consumer organization, start with three premises. First, reform is happening and we need to be involved in it to be sure it does not become draconian, and that when all is said and done, our members will have a just and fair compensation system. Second, that we the consumers pay the product liability costs in the prices of the aviation products that we buy. And, third that the present system is inefficient, giving only a small portion of the amounts spent on product liability to the victims, leaving quite a bit of room for improvement.

So, we have become involved. We have attempted to work with the general aviation manufacturers and others who are attempting this reform. It has been a good faith give-and-take effort. We are especially proud that this legislation does not seek to impose some of the more draconian reforms which have been considered, such a limitations on non-economic damages and punitive damages, restrictions on attorney's fees and the contingent fee sYstem, and the like. While we have endorsed H.R. 2238 which avoids these same problems, we do have concern about some of the provisions of the House bill. We congratulate the Senate in addressing and curing most of our concerns in S.473. We agree that the time limitation on the manufacturer's liability should be 20 years, as in S.473, rather than 12 years, as in H.R. 2238. We also agree that the engineering practices at the time when the product left the manufacturer's control, rather than when a type certificate issued, should determine whether the product is defective.

We agree that compliance with FAA standards should be admissible with regard to whether a product is defective, rather than have such compliance shift the burden to the claimant.

One improvement we would like to see in the Senate bill has to do with the manufacturer's defense that the defective condition could have been corrected by compliance with an airworthiness directive issued by the FAA or a service bulletin issued by the manufacturer. We prefer that the defense be limited to noncompliance with an FAA airworthiness directive. A service bulletin is within the complete discretion of the manufacturer, and the provision as drafted would create an incentive to the manufacturer to issue bulletins for liability reasons. An airworthiness directive will accomplish the purpose of the provision and at the same time give the aircraft owner some protection that the FAA will be reasonable in its issuance. The manufacturer always has the prerogative of asking FAA for the issuance of an airworthiness directive to correct a particular defective condition.

In conclusion, we would like to thank the Subcommittee for the opportunity to appear here today in support of S.473.

AOPA
AIRCRAFT OWNERS & PILOTS ASSOCIATION

January 5, 1988

Senator Ernest F. Hollings
Chairman
Committee on Commerce, Science
  and Transportation
United States Senate
Washington, DC 20510-6125

Dear Chairman Hollings:

Thank you for the opportunity to respond to your additional questions regarding our Association's position on S. 473, the General Aviation Liability Standards Act.

1. You ask whether our Association is satisfied that compliance by manufacturers with FAA standards, which are by law minimum, adequately protects the safety of our members as well as other users of aircraft.

It is difficult to respond to the question in the terms presented because it seems to be based on two incorrect premises. It presumes that under S. 473 compliance by manufacturers with FAA standards would constitute a defense to any action brought under that law. It also presumes that our Association would support such a defense. Neither is true.

S. 473 allows recovery against a manufacturer for its negligence, and additionally allows recovery for strict liability against the manufacturer of a defective product whether it was negligent or not. Compliance with FAA standards is not a defense to either basis of recovery. However, evidence of such compliance would be admissible with regard to whether a product was defective and unreasonably dangerous for its' intended purpose. Our Association agrees that such evidence should be admissible for this purpose. Our Association does not support an absolute defense of compliance with Federal standards.

2. You ask what evidence or assurance does our Association have that the manufacturers will pass any reduced liability costs onto the purchasers of the aircraft.

We have received no such assurances from the manufacturers. We hope that competitive factors will force a reduction in prices commensurate with any saving achieved by S. 473. Furthermore our Association, in its continuing representation of its members interests, would take whatever other steps are reasonable to insure that the savings are passed on to our members.

We are aware of arguments put forth by the plaintiffs' bar that there are no guarantees that the consumer will be the beneficiaries of any savings achieved by S. 473. We question the legitimacy of these arguments. We are as much concerned with a fair compensation system for the victims of defective aviation products as is the plaintiffs' bar. In this regard we make bold to suggest that our interest is more direct. We are also interested in assuring a continued supply of aviation products at reasonable cost, which does not seem to be any concern of the plaintiffs' bar.

3. You ask whether our Association views S. 473 primarily as an effort to revive a flagging industry.

As we have already indicated, one of the principal reasons for our support of this bill is to assure the continued availability of aviation products at reasonable cost. All of our members are consumers of aviation products. Some of our members have been injured by defective aviation products and, in the future, may be injured or damaged by defective aviation products. We feel that there is an opportunity to serve both interests in this legislation because the present system is so inefficient. We feel that we can insure a fair compensation system for victims of defective aviation products at the same time reducing product liability costs. We are not at all interested in advancing the financial interests of the manufacturers except to the extent that it serves our members interests, nor do we have any particular interest in reducing the financial advantages of the plaintiffs' bar in this inefficient system except to the extent that it serves our members interests.

We trust that this adequately responds to your questions. If you require amplification, or if you have any further questions, it will be our pleasure to respond.

Senator, perhaps a summary note is in order. The questions which you pose appear to be a reiteration of challenges we have received from the plaintiffs' bar, and for that reason our responses may appear one sided. We wish to assure you, as well as the plaintiffs' bar, that we appreciate your assistance in preserving the rights of our members to fair and adequate compensation for injury and damage due to defective aviation products. To that end we welcome your and their input. We would like to believe that our collective efforts have insured that this legislation does not contain some of the so-called "reforms" such as caps on damages, interference with the contingent fee arrangements, and many of the other "reforms" inimical to our members' interests. We would like to believe that our collective efforts are responsible for making the Senate version a better one than the House version. We would like to believe that we can enlist your and their support for the additional points mentioned in my testimony. Lastly, we happily remain receptive to any input which will help us represent our members' interests.

Cordially,

John S. Yodice

John S. Yodice
General Counsel

General Aviation
Manufacturers Association

Edward W. Stimpson
President

Suite 801
1400 K Street, N.W.
Washington, D.C. 20005
(202) 393-1500

January 7, 1988

The Honorable Wendell Ford, Chairman
Subcommittee on Aviation
Senate Commerce, Science and
Transportation Committee
United States Senate
Washington, DC 20510

Dear Senator Ford:

GAMA was recently given a copy of a December 16, 1987, letter sent to you by four national consumer groups. They oppose S. 473 because they "fear its effect on the legal rights of injured passengers and its impact on safety."

They included, as an attachment, a letter they sent to Senator Danforth in July 1986. They cited some legitimate concerns with an amendment which was a precursor of S. 473; these concerns were resolved during mark-up of S. 2794 in 1986, the bill that was reintroduced as S. 473.

The letters contain a number of misleading and erroneous statements. We offer the attached paper in rebuttal.

Sincerely,

Enclosures

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Manufacturers Association

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Four national consumer groups are circulating a letter in opposition to S.473, the General Aviation Liability Standards Act of 1987, GAMA feels a need to address some of the errors and misstatements in their letter.

GAMA considers it to be a gross misstatement of the intent of the legislation to claim it "...would make it exceedingly difficult in many cases, if not impossible, for innocent passengers and their families to receive adequate compensation for the horrendous injuries and deaths associated with general aviation air crashes". This obviously inflammatory language is not supported by any facts or information the consumer groups have presented or even referred to in present or past statements.

Their attachment, the July 17, 1986 letter to Senator John Danforth containing their detailed analysis, refers, of course, to a different bill. Its main concern, dealing with the innocent by-stander issue, is, of course, taken care of in S.473. Innocent by-standers are excluded. The argument on state-of-the-art and the claim it would introduce a negligence standard where a strict liability standard was desired, though mistaken, has lead to a clarification in S.473 that clearly preserves the strict liability standard for manufacturers. The issue of state of the art, to be viewed in light of existing technology, has been changed to the Restatement doctrine of "reasonably feasible" in S.473.

The consumer groups' remaining arguments in their July 17, 1986 letter cover regulation by FAA and the minimum standards issue (quoting from the Varig decision) and their claim that the industry opposed the regulations it now seeks to hide behind. These arguments are virtually identical to those contained in the testimony of the Association of Trial Lawyers of America (ATLA) on S.473; they have been rebutted in a separate paper on the ATLA testimony.

The consumer groups have apparently switched their tactic from "we represent the consumers of these products" to "we represent the passengers who ride in these aircraft." Those who own and fly general aviation aircraft, as well as those who ride as passengers with them, are not the unsophisticated, unknowing people that the consumer groups make them out to be. When considering how few accidents are in fact caused by design and manufacturing defects -- according to the NTSB -- the risk that persons who ride in general aviation aircraft take is indeed slight. Nonetheless, they would know that the protection provided under the law in the case of injury or death would be uniform and fair, regardless of where an accident occurs or a suit is filed. This is a benefit they do not enjoy today.

The consumer groups go on to address what they consider to be a failure in this bill, "...the pressing need for improved safety in the air transport system," citing last year's Aero Mexico disaster. The problems that they seek to correct have, fortunately, been taken care of by the Commerce Committee. Through your efforts in ensuring that additional air traffic controllers will be added to the FAA ranks, and through amendments that will require the installation of Mode C and TCAS equipment, we hope to see sufficient improvements in our air traffic control system to prevent another Aero Mexico disaster or anything close to it. The Airport and Airways Improvement Amendments of 1987 will lead to increased efficiency, professionalism and safety in the system.

We expect that S.473 will eliminate the vagueries and varieties of state law that substantially affect the outcome of cases. A plaintiff's current ability to choose the most favorable jurisdiction in which to bring an action can provide him a significant advantage. Under current law, even in cases removed to federal court, that federal court must use the substantive law of the state in which the federal court resides.

We expect that this bill will eventually make it clear that, within the field of general aviation, all persons will be held responsible for their own actions; there will be less opportunity to shift liability to a "deep pocket." This recognition will, hopefully, encourage aircraft operators and owners to carry adequate comprehensive insurance covering themselves and their passengers. This recognition should also encourage those who service and repair aircraft to carry adequate insurance to cover errors in their work. If all persons involved in operating, servicing and maintaining general aviation aircraft apply the necessary diligence to their jobs, general aviation will, as it has for the past forty-plus years, become safer with the passage of time.

With needed corrections to the tort system that today unduly favors a few at the expense of the many, liability costs to the manufacturers, either through self-insurance or through purchased insurance, will likely stabilize and possibly decrease, making aircraft and spare parts available at affordable costs. Moreover, if pilots, operators and repair services are motivated to increase their liability protection, the cost per unit of that protection will decrease because the insurance burden will be borne by a larger population.

In summary , by extending Federal jurisdiction to tort litigation of general aviation accidents as S.473 does, all will benefit.

General Aviation
Manufacturers Association

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Edward W. Stimpson
President

January 7, 1988

The Honorable Wendell Ford, Chairman
Subcommittee on Aviation
Senate Commerce, Science and
Transportation Committee
United States Senate
Washington, DC 20510

Dear Senator Ford:

We have reviewed the statement of the Association of Trial Lawyers of America presented before your subcommittee on December 3, 1987. It was offered in opposition to S. 473, the General Aviation Accident Liability Standards Act of 1987.

Their statement contains a number of statements that are either misleading or untrue. Inasmuch as we did not have an opportunity to challenge the ATLA witness, we offer the enclosed in rebuttal. We respectfully request this paper be made a part of the record.

We deeply appreciate your interest in the general aviation problem, and look forward to working with you in search of a solution.

Sincerely,

Ed

Enclosures

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COMMENTS ON ATLA TESTIMONY

A review of the statement of the Association of Trial Lawyers of America, presented before the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Aviation, on S.473, the "General Aviation Accident Liability Standards Act of 1987", on December 3, 1987, is disconcerting. It contains a number of statements about the bill, the Federal Aviation Act and FAA's certification procedures, as expressed by the Supreme Court of the United State in the "Varig" case, that are not true or factual.

Safety Regulation

ATLA's opinion of the purpose of S.473 includes the last paragraph on Page 1, starting with "It is ironic and misleading that the justification for Federal involvement..." This is a blatant misstatement of the truth if they mean that "[t]hese same people" opposing "...tough, comprehensive regulation by the Federal Aviation Administration" are the manufacturers of the aircraft. The aircraft manufacturers have continually supported federal safety regulation and oversight of design, construction and operation of aircraft since the early 1920's.

Minimum Standards

The manufacturers' support of safety is evidenced by our involvement in FAA regulatory and educational activities and our work with the FAA in the development of safer aircraft through the normal regulatory process. GAMA's financial and promotional support for FAA's Accident Prevention Program, since 1970 (when GAMA was formed), is but one example of the manufacturers' commitment to safety.

ATLA states on Page 2, the manufacturers "...fail to cite what they know is also true: That the Federal Aviation Act of 1958, by its very terms, specifically requires the agency to set only minimum standards. Minimum standards do not necessarily establish an acceptable level of safety."

It is ATLA who distorts the facts by deliberately omitting the key, operative words in the Federal Aviation Act, thereby misrepresenting the FAA's certification obligations.

The pertinent language of the Federal Aviation Act of 1958 is as follows:

"TITLE VI--SAFETY REGULATION OF CIVIL AERONAUTICS

GENERAL *SAFETY* POWERS AND DUTIES

Minimum Standards; Rules and Regulations

Sec. 601 [49 U.S. Code 1421]. (a) The Administrator is empowered and it shall be his *duty to promote safety of flight* of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such *minimum standards* governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers *as may be required in the interest of safety*;

(2) Such *minimum standards* governing appliances *as may be required in the interest of safety*;

(3) Reasonable rules and regulations and *minimum standards governing, in the interest of safety*, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) ...the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made,...

(4) ...

(5) ...; and

(6) Such *reasonable rules and regulations, or minimum standards*, governing other practices, methods, and procedure, as the Administrator may find *necessary to provide adequately for national security and safety* in air commerce." [Emphasis supplied.]

It is clear that the term "minimum standards" is always qualified by the words "in the interest of safety" or "necessary for safety." These qualifiers require FAA to establish a significantly higher standard than just the 'minimum' alleged by ATLA.

Aircraft Certification Responsibility

To compound its distortion of the Federal Aviation Act, ATLA has twisted both the facts and the holding in its excerpts from the "Varig" case (U.S. v. S.A. Empressa De Viacao Aerea Rio Grandense Varig, 104 S. Ct. 2755, 2761 (1984)). The correct scope of the Supreme Court's decision in the Varig case is seen in a March 31, 1987 decision by the Federal Court for the Western District of Pennsylvania (Behling v. U.S., 20 AVI, 18135). Quoted sections in the Behling excerpt refer to pages in the Varig case.

> "Varig involved a challenge to the FAA's aircraft certification procedures. The FAA, acting under a regulatory mandate from Congress, had established a multi-step scheme for aircraft certification whereby the manufacturer was required to obtain a series of certificates during the design and production of an aircraft, including an 'airworthiness certificate' obtained prior to placing the aircraft into service, and 'supplemental type certificates' for later alterations to the aircraft. Id. at 804-06. The FAA did not have the personnel to issue all the required certificates. Id. at 807. Therefore, its certification system essentially shifted responsibility to the aircraft manufacturer to 'develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a "spot check" of the manufacturer's work.' Id. at 816-17. In this scheme, the role of the FAA is to police compliance rather than have its personnel perform the entire certification process. The Supreme Court held that the discretionary function exception was designed precisely to protect the FAA from liability for designing a certification process which had to allow for 'such practical considerations as staffing and funding'."

Both the Varig and Behling cases were decided on the limited issue of the discretionary exception to the Federal Torts Claims Act. FAA was being sued by Varig, a Brazilian airline, for the loss of an aircraft due to a fire in the lavatory, on the grounds that FAA negligently certified that the lavatory waste disposal container would contain a fire. The Behling case involved a suit against FAA for the wrongful deaths of two passengers and the pilot of an aircraft that crashed while making an instrument approach on grounds that FAA negligently maintained a part of the instrument landing system. An abbreviated version of the Varig decision, covering that part of the decision dealing with the issue of FAA's involvement in the certification of aircraft, is attached. A copy of the Behling decision is also attached.

When it could not be shown that the FAA specifically examined the waste disposal container and had reviewed only some of the many certification items, the Court found that it was within FAA's discretion to certify aircraft in this manner and the Varig claim against FAA was dismissed under the discretionary exception to the Federal Tort Claims Act. This case and the current FAA and industry practices do not ". . . .involve a significant degree of self-regulation by the industry."

Neither the Federal Aviation Act nor the FAA's rules permit the FAA to devest itself of responsibility for certification. FAA rules make the applicant responsible for conducting all inspections and tests subject to FAA oversight and involvement in any phase of certification in which the FAA chooses to involve itself as the guardian of the public's safety. The FAA represents the public -- not the manufacturer -- in the certification process. Thousands of hours of FAA employee time is spent conducting tests of new aircraft types (though not all tests), particularly tests involving performance and handling qualities that are critical to the safety of the aircraft. These FAA flight test pilots and engineers rely on the manufacturer to conduct the initial flight tests before they take their seats in the cockpit. There is no self-regulation by the industry, as is claimed by ATLA, only a degree of self-certification, subject to FAA review and subject to FAA demand to provide additional information or data or to repeat, in the presence of FAA, a previously conducted test.

Antiquated Regulatory Standards

ATLA also incorrectly claims that the FAA regulatory standards are often "...antiquated" and "...based upon technology dating back to the 1940's", "...without governmental incentive for manufacturers to surpass them." It should be noted that knowledge is cumulative in character and use. What we learned in the 1940's that produces a safe airplane, we keep; what we didn't know then and know now, we add to the rules. This is the character of FAA regulations.

Standards of Liability

ATLA comments that S.473 would "...unfairly and without just cause tilt the balance..." (P. 3) in favor of defendants by "[i]mposing a negligence standard and [by] requiring a victim to prove what a manufacturer knows or knew or should have known..." ATLA inaccurately claims that this bill would impose a negligence standard where one does not now exist under state common law. The truth is that this bill preserves the negligence cause of action and adds to it a strict liability cause of action against manufacturers. The concept of strict liability, to be established under Section 5(b) of the bill, and the level of proof required of a plaintiff, are not new, onerous provisions. They are the basic substance of state strict liability causes of action as evidenced in the Restatement concept of strict liability.

By linking sections 5(a) and (b), ATLA makes it appear that negligence is the only course of action for a plaintiff and that the negligence standard of proof is being made more severe. This is patently untrue. Likewise, though state of the art is currently a defense to be considered by a jury in both negligence and strict liability actions under most states' law, the letter ATLA quotes in its testimony appears to equate a defense to an action with a bar to liability. An airplane that was unreasonably dangerous and defective would not, by definition, be designed or built by a reasonable manufacturer. The state of the art -- a moving front of technology -- is not the same as the status quo of the past.

Intended Purpose or Use

Page 5 of ATLA's testimony contains an erroneous characterization of the 'intended purpose' language in the Bill. ATLA expresses concerns that under the bill, the plaintiff must prove that the aircraft "was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured." This is generally the current law. They also allege that the manufacturer would be able to avoid liability "...where the plaintiff used the aircraft in a manner slightly different than intended by the manufacturer, even though such use was foreseeable..." (underlining supplied). It is difficult to imagine any attorney making this claim about the bill without knowledge that it is either reckless or untrue.

'Intended use' means used in accordance with FAA regulations and in accordance with the flight envelope established by the manufacturer and listed in the Limitations section of the Pilots Operating Handbook which is required to be carried in each aircraft and defines the manner in which the airplane may be safely used. It is foreseeable, though unfortunate, that some person might use an aircraft to buzz the home of a friend, at an altitude illegal under FAA rules, and strike electrical wires, destroying the aircraft and killing the pilot. It has happened, but should the manufacturer be liable? Should the manufacturer be required to build an aircraft that can withstand the forces involved in this dangerous, illegal activity, and resultant impact with the ground?

We know that airplanes are operated by pilots who get into weather situations they cannot handle and subsequently crash into mountain sides. Should we make the airplane mountain-proof? We cannot, in any practical sense, though it is foreseeable that people will fly aircraft into the sides of mountains. However, whatever one may do with his aircraft in a legal, common-sense manner, in accordance with commonly accepted pilot judgement, is within the scope of practical foreseeability of both the manufacturer and the operator. If there are design or manufacturing defects that cause an aircraft to fail when used in this manner, the manufacturer would accept liability.

Crashworthiness

The ATLA statement that "[m]anufacturers may escape liability - even though they know that aircraft crash - simply because they do not intend that they crash" is an irresponsible misrepresentation of the bill. The manufacturers well recognize the certification rules of Part 23 and Part 25 (and the predecessor rules). These rules require that the airplane behave in a certain manner and protect the occupants from crash loads of a defined nature. Crash protection is part of the certification program and the manufacturers must prove the safety of the aircraft under FAA's defined crash conditions. FAA requires that airplanes demonstrate crashworthiness as part of the FAA certification regulations, though manufacturers hope that none of their aircraft crash. FAA's and industry's concern with crashworthiness dates back to the first certification rules, promulgated under the Air Commerce Act of 1926 that became effective on December 31, 1926.

It is not the manufacturers who fail to install shoulder harnesses in aircraft that cause injuries from lack of shoulder harnesses; it is the refusal of the owner to purchase and install harnesses if none were originally installed, or the operator's refusal to use the harnesses if installed. Shoulder harnesses have been available on general aviation aircraft since the early 1950's but, like automobile restraints, their use was resisted by the operators. As optional equipment, they were not purchased by purchasers of aircraft. Since the late 1970's, we have installed them in all newly manufactured aircraft and petitioned the FAA to require their use.

Accident Causes

An aircraft, new or old, is an item whose safety depends on two prime factors: its operator and its maintenance. Poor judgement in its operation or poor maintenance can cause the safest design and the safest construction to become lethal. The data compiled by the NTSB concerning the primary causes of accidents shows that fewer than 7% are the result of design or manufacturing defects. This data is similar to that compiled by accident investigation authorities in other countries. Further, pilot training concentrates on coping with emergencies. Discounting the fact that aircraft engines, for instance, are operated under far more demanding conditions than are auto engines, who expects their auto engines will never quit while on the highway?

Cost vs. Demand

ATLA is entitled to its unsupported belief that "[t]he decline in demand for general aviation aircraft ... is unrelated to product liability law." Though a number of factors affect demand for new aircraft, one of the most important is price. The rising price of aircraft, which includes a very significant product liability cost element, deters potential customers. Flight schools and universities with flying curricula need additional training aircraft and must pay more for used airplanes today than they paid for new aircraft in the 1982/83 time frame. We must recognize that todays new aircraft bear the liability costs for the thousands of aircraft that entered the fleet long ago.

Perhaps, as ATLA says, "...there are still [sic] aircraft in use which are unsafe and whose defects should be remedied." If so, FAA has the responsibility and authority to ground them and it should do so. To hold manufacturers liable for the years of neglect, poor maintenance or pilot error is not the way to improve safety or prevent injuries.

NATA
Founded
December 28, 1940

NATIONAL AIR TRANSPORTATION ASSOCIATION
4226 King Street • Alexandria, Virginia 22302 • (703) 845-9000

1987 DEC 14 AM 8 25

December 11, 1987

The Honorable Wendell H. Ford, Chairman
Subcommittee on Aviation
Senate Commerce, Science and Transportation Committee
United States Senate
SH-428 Hart Senate Office Building
Washington, DC 20510

For The Record: December 3, 1987 Subcommittee on Aviation, Hearing on S. 473, The General Aviation Accident Liability Standards Act.

Dear Senator Ford:

The National Air Transportation Association represents the interests of the nation's fixed base operators and air taxi airlines. Since NATA Members repair, sell, and own aircraft, they are in the unique position of being concerned with both manufacturers' and consumers' interests with regard to the subject of product liability. We appreciate this opportunity to comment, for the record, on the effects of the high cost of product liability insurance on the general aviation industry.

During the Subcommittee's December 3rd hearing on the issue, many witnesses pointed out the tremendous increases in recent years for product liability insurance. Those increases have not been limited to airframe manufacturers; our Members too have experienced significant increases in insurance premiums. Since FBOs and air taxis typically purchase their insurance as a package (product liability, hangar-keepers liability, general liability, etc), and pay one premium for that package, it is virtually impossible to identify exactly how much the premiums for product liability insurance alone have increased. However, an Association survey indicated that 1985 to 1986 increases in NATA Members' overall insurance costs averaged 46 percent, with the highest increase reported to be 500 percent. NATA Members are indeed concerned about the cost of insurance.

Representing Commercial Aviation Service and Transportation Companies

The Honorable Wendell H. Ford
December 11, 1987
Page 2 of 2

We applaud your efforts to address this problem with this hearing on the General Aviation Accident Liability Standards Act and lend our full support to product liability reform. There is, however, one area of concern to us of which you should be aware.

The statute of repose concept, which NATA endorses, has received much publicity as a tool to eliminate manufacturers from the liability chain after a predetermined period of time has passed. We are unsure if the same concept applies to non-manufacturers involved in the product liability loop. For example, is a repair station absolved of liability for repairs made once the statute of repose has expired? If so, we suggest clarifying language be included; if not, we suggest it is only fair that repair stations are treated like manufacturers in this regard. We are prepared to assist you and your staff to draft such language.

We appreciate this opportunity to comment for the record. If you need any additional information about the FBO/air taxi industry, please contact us.

Sincerely,

William H. Power
Vice President,
Government Affairs

December 16, 1987

The Honorable Wendell Ford
Senate Commerce, Science and
  Transportation Committee
Subcommittee on Aviation
227 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Ford:

As four national consumer groups, we wish to register our opposition to the "General Aviation Liability Standards Act of 1987", S. 473 ---the subject of a recent hearing before your Subcommittee on Aviation. We oppose this legislation because we fear its effects on the legal rights of injured passengers and on product safety. This legislation would make it exceedingly more difficult, if not impossible in many cases, for innocent passengers and their families to receive adequate compensation for the horrendous injuries and deaths associated with general aviation air crashes.

We believe passengers, or their representatives, should be able to pursue compensation for their losses from manufacturers and sellers under state law, not under this bill. Even if pilots and owners wish to restrict their own rights to recovery, as is indicated by their support for S. 473, such restrictions should not be applied against passengers, who, through no fault of their own, are injured by unreasonably dangerous and defective small planes.

Additionally, the bill fails to address the pressing need for improved safety in the air transport system. The Federal Aviation Administration's system for approving and regulating the design and manufacture of general aviation aircraft frequently fails to ensure optimum safety. Last year's Aero Mexico disaster revealed some clear safety infirmities in the general aviation industry, which suggest the following changes are necessary: improved air collision avoidance technology on general aviation aircraft, relief from air traffic congestion, and increased policing of compliance with safety regulations. Rather than addressing any of these compelling safety concerns, the bill instead focuses solely on revisions of liability rules which will protect manufacturers, at the expense of passengers.

We are attaching to this letter joint comments on similar legislation reported from the Senate Committee on Commerce in the 99th Congress. We would appreciate your including this letter and our attached comments in the hearing record.

Thank you for considering our views.

Sincerely,

Gene Kimmelman

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Eric Hard

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Attachment.

Washington, DC 20510, September 22, 1986.

Dear Senator:

Consumers Union, Public Citizen, Consumer Federation of America, and U.S. PIRG respectfully oppose the "General Aviation Tort Reform Act of 1986," S. 2794 which would replace state general aviation product liability law with federal negligence-based standards of liability. This legislation would have an adverse impact on the existing safety incentives of the tort system and would impair the ability of general aviation air disaster victims, including innocent passengers to obtain compensation for their injuries. Similarly if S. 2794 were enacted, passengers injured in a defective, unreasonably dangerous light plane would encounter multitudinous legal obstacles which may deprive them of justifiable recoveries.

"Reforms" of the tort system, like S. 2794, would significantly reduce a consumer's potential for redress in the courts without providing any other, equally effective method for obtaining compensation. This legislation drastically cuts back current legal rights of those individuals injured in a general aviation accident, without adding anything back to the product liability system to fill the void.

REGULATION BY THE FAA

The General Aviation manufacturers argue that they deserve special treatment because their industry receives extensive regulatory scrutiny by the Federal Aviation Administration. (FAA). While it is correct to assert, as proponents of the bill do, that the FAA establishes standards for aircraft design, materials, workmanship, construction and performance, the Federal Aviation Act of 1958, 49 U.S.C. 1421 (a)(1)(Supp. 1985) specifically requires the agency to set only minimum safety standards. Compliance with these standards indicates no more than the manufacturer performed the minimum effort required to make a produce safe. See RESTATEMENT (Second) of Torts *288C (1969) See also Wilson v. Piper Aircraft Corp, 282 Or. 61, 577 P.2d 1322 (1978); Rucker v. Norfolk & Western Railway, 77 Ill 2d 434, 396 N.E. 2d 534 (1979). Government standards may be outdated or under protective, and may not reflect the state of knowledge of the industry concerning all safety consequences of industry practices.

More important, FAA regulation often amounts to nothing more than self-regulation by the industry. In certifying the design, manufacture and airworthiness of a craft, "by regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements." [U.S. v. S. A. Empresa De Viacao Aerea Rio Grandense Varig, 467 U.S. 797,104 S. Ct. 2761, 2756 (1984); see also 14 CFR §§21.33,21.35 (1983)]. As the Supreme Court in Varig explained, the intimate involvement of aircraft manufacturers' employees themselves in the certification process is compounded by the FAA's own practices: With fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, 49 U.S.C. § 1355 authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process. 14 CFR § 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. See generally Improving Aircraft Safety 29-30. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. 14 CFR § 183.1 (1984). In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees. FAA Order 8110.4 p. 151; CAA Manual of Procedure § .70(b). FAA employees may briefly review the reports and other data submitted by representatives before certificating a subject aircraft. Improving Aircraft Safety 31-32; FAA Order 8110.4; p. 159; CAA Manual of Procedure § .77.

In view of this, it is not surprising that the Supreme Court of California concluded in Elswcrth v. Beech Aircraft Corp., 208 Cal. Rptr. 874 (1984):

Here, there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes, in spite of the face that federal law may have completely occupied the field of regulation of aircraft safety and certification. The Federal Aviation Act of 1958 expressly declares that its provisions are not intended to abridge remedies that a party may have under state law. (49 U.S.C. § 1506). We are not aware of any alteration of the Federal Aviation Act or of any changes in FAA practices that would justify the abridgement of state tort law remedies embodied in S. 2794.

Finally, it is ironic that the same community of airplane makers and users, known for opposing regulation by the FAA, is now seeking to hide behind such regulation as a means of avoiding liability. A comment from the Airline Users magazine, Flying illuminates this point: We the users of airplanes, have brought today's accident rate on ourselves. For years, waving the "freedom to fly" banner, the general aviation community has opposed proposals for rules, regulations, and procedures that could have a beneficial effect on safety and thus make flying less expensive. Flying, August 1984.

LIABILITY INSURANCE

General aviation is not the only endeavor plagued by substantial liability insurance rate increases this year. Professions and activities, such as day care centers, nurse midwives, school bus companies, commercial fishermen, architects, accountants, municipalities, and physicians are similarly affected by the recent crisis in insurance affordability and availability. These groups have experienced staggering rate increases, despite the fact that negligence, not strict liability is the operative liability standard for tort suits against them. The surge in insurance premiums for groups including general aviation is the result of the insurance industry's management practices, not any particular standard of liability.

As the Senate Commerce Committee Report on the Risk Retention Amendments of 1986 emphasized: Witnesses noted that the insurance crisis has arisen during a period of falling interest rates, prior to which competing insurance companies had been under pricing their product in order to maximize cash flow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment income was no longer compensating for underwriting losses. This practice of "cash flow underwriting" was linked directly to the current crisis." (at page 4) When interest rates fell, the insurance industry jacked up rates for all liability insurance consumers, not just those involved in general aviation.

Legislation like S. 2794 which seeks to solve the insurance crisis by making it harder for victims to recover is totally misdirected. The insurance industry has offered no guarantee that premiums will fall as a result of this bill. Instead of solving the insurance crisis for the general aviation industry, the clear result of S. 2794 would be more uncompensated victims and unchecked hazards.

THE ISSUE OF SUPPLY AND DEMAND AND STATUTE OF REPOSE

The source of the economic decline of the general aviation industry can be traced to the surplus of high quality, used airplanes on the market. S. 2794 does not address the problems for the industry caused by over supply and reduced demand. The March, 1986 issue of Industry Week noted that: "A great many good used aircraft remain available, especially at the low end-which reflects a basic industry problem: it makes its planes too well...."

"Until recently, major technological advances have been rare."

The Director of Communications at the General Aviation Manufacturers Association explained the present economic picture for the industry as follows: "It's a rather common opinion that we probably built too many aircraft in the late seventies in response to consumer demand fed by speculation, especially speculation on interest rates and rising prices. It's easy now to forget the heady times back then when everyone was scrambling to buy sports cars and seemingly everything else to avoid higher prices next year--a classic effect of fast-moving inflation."....We did enjoy a boom in the mid-1960's and mid-to late 1970's that perhaps clouds our current view of the situation." (Drew Steketee, "Letters to the Editor", Aviation Digest (July 1986).

To resolve the problem caused by the oversupply of good, high quality used aircraft which compete favorably with the new models, the general aviation industry is seeking an arbitrary cut-off of the right to pursue claims for damages. Under Section 7 of S. 2794, passengers injured in a general aviation accident would not have the right to pursue a claim, if the accident involved a small craft or its parts which were more than 20 years of age. Thus, the bill would automatically cut off remedies even before injury or death occurred, or before any claim for damages could be reasonably asserted. This automatic cut-off would operate to prevent recoveries, irrespective of the useful life of the general aviation aircraft or the underlying cause of the injury.

STANDARDS OF LIABILITY

Section 5, which sets forth the standards of manufacturer liability, dramatically tips the scales of justice against the victims of aviation accidents that result from dangerous defects in the aircraft involved. Section 5 would upset the proper balance between parties to a lawsuit by eviscerating the doctrine of strict liability and creating significant barriers to recovery.

Product liability cases are inevitably complex ones where the manufacturer's expertise and necessarily greater knowledge of the facts relevant to the issue of a product's design and manufacture create crucial advantages for defendants in the cases. Under S. 2794, accident victims would be forced to prove not only that a product was dangerously defective (as under the doctrine of strict liability) but other elements of liability, evidence for which in many cases can be impossibly elusive.

Specifically, a number of provisions included in Section 5 would only make it more difficult for plaintiffs to take on manufacturers in product liability litigation.

1. Section 5(b)(1)(A) Would Increase Plaintiff's Burden

Section 5 would impose on plaintiffs a significant added burden when they brought strict liability claims. Instead of merely having to come forward and show that the product that injured them was defectively dangerous, they would also have to prove, in effect, that the condition of the product was unreasonably dangerous according to "engineering and manufacturing practices... which were reasonably feasible." Most courts already permit the feasibility of design alternatives to be considered as part of the determination of a product's defectiveness. See e??. Barker v. Lull, Eng inerring Co., Inc., 573 P.2d 443 (Ca. 1978); Bruce v. Martin-Marietta Corp. & Ozark Airlines, Inc., 544 F.2d 442 (10th Cir. 1976) (applying Maryland and Missouri law). However, as the court in Barker made clear the burden of proving that the product was not defective in light of what was feasible must rest with the manufacturer. After all, it is the manufacturer who is uniquely positioned to understand the characteristics of a product's design as well as those of any alternatives. It is simply unfair to require the far less qualified of the two parties, the plainfiff, to shoulder the burden of proof in this inquiry.

2. Section 5(b)(1)(A) Narrows Manufacturer Liability

At the same time, Section 5(b)(1)(A) would narrow the scope of a manufacturer's liability for an unsafe product. Before a plaintiff could even get his or her case to the jury, he or she would have to show not just that the defect was unreasonably dangerous in light of what could or should have been possible but that the product was defective "according to engineering and manufacturing practices, which were reasonably feasible." The use of the phrase "engineering and manufacturing practices" comes uncomfortably close to suggesting that the measure of defectiveness would be the customs and practices of the industry. Even under the negligence context, the law has long since rejected the notion that a manufacturer's obligations are limited by industry custom or practice. See The T.J. Hooper, 60 F. 2d 737 (2d Cir. 1932) (L. Hand, J.).

Any inclusion of a "state-of-the-art" concept in a strict liability standard, as section 5 would do, must encompass incentives to produce safer aircraft. Defectiveness or unreasonable danger must be determined with regard not just to what was known but to what could have been known. At the same product design must be adjudged with regard not just to what was reasonably feasible but to what could have been rendered feasible. A narrower formula such as the one included in section 5 would seriously undercut manufacturers' incentives for safety. Holding a product to no greater standard that reasonable feasibility would mean that the law would not require the manufacturer to push the limits of "existing technology" of safety beyond current limits—just the opposite of what the doctrine of strict liability must continue to do.

It is noteworthy that companion legislation in the Senate did not include the phrase "in ligth of existing technology" when the Commerce Committee voted to report the bill last week.

3. Section 5 Would Relieve Manufacturers of the Duty of Producing "Crashworthy" Aircraft or Aircraft Capable of Withstanding Other Foreseeable Risks

Section 5(b)(1)(a) would adjudge the safety design of a craft only in the context of its "intended use" or "intended purpose." Current law, however, requires more of a product: it must be adequate to meet all foreseeable circumstances even if they involve uses or misuses that were never intended. This doctrine of foreseeability is indispensable to ensuring the safety incentives created by strict liability. See, e.g., Larue v. National Union Electric, 571 F.2d 51 (lst Cir. 1978).

Under current law, it would be impossible in virtually any state court for aircraft owners to argue that either unusual exigencies or pilot boldness, for example, are not foreseeable in the use of their aircraft. Nor could they argue that such foreseeable factors would not lead to foreseeable deviations in the use of the aircraft from "the purpose and ... manner for which it was designed and manufacturerd." From the point of view of safety, particularly the safety of innocent passengers who have no control over such exigencies or deviations, it is critical that manufacturers continue to be obliged to make products that can accommodate the risks that result from such deviations. Unfortunately, section 5 would relieve manufacturer's of this obligation.

This doctrine is particularly vital in the area of general aviation because "foreseeability" helps to ensure that aircraft are designed to be "crashworthy". If the design of craft were considered only in the context of their intended use (i.e., used to fly, not to crash) then aircraft would not have to be designed, as they are now, to protect occupants from injuries in crashes. Meil v. Piper Aircraft Corporation, 658 F.2d 787 (10th Cir. 1981); Duncan v. Cessna Aircraft Co., 632 W.W.2d 375 (Tex. App. 1982). See Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). Indeed, courts fashioned the concept of "crashworthiness" as a design element required for the foreseeable risks created by aircraft and automobiles precisely in response to manufacturers' arguments that air and auto crashes were not among the intended uses of planes and cars. In Duncan, for example, an easily correctable design flaw in the occupant seats led to death in a low-speed plane crash. The manufacturer sought to escape liability in part on the ground that the accident was not an intended use of the craft. Defining foreseeability very broadly, the court ruled that the manufacturer had to be held liable for foreseeable, if unintended, mishaps.

JOINT AND SEVERAL LIABILITY

S. 2794 would arbitrarily restrict recovery in general aviation accidents by substantially limiting the liability of defendants who share responsibility for the accidents. Rather than allow injured parties to recover all their damages from a defendant who is substantially responsible for the injuries, as under the widely accepted state law rule of joint and several liability, S. 2794 would limit defendants' financial exposure to the exact percentage of damages that plaintiffs can prove each defendant responsible for.

Section 6's rule of comparative responsibility would hold the innocent victims of general aviation accidents—instead of the manufacturers, suppliers, maintenance personnel or pilots who caused the accident—financially responsible for the portion of damages attributed to "nonparties" (e.g., insolvent manufacturers, under- or un-insured suppliers and employers immune from lawsuits under workers' compensation laws). This rule of law would leave general aviation accident victims undercompensated by limiting the liability of defendants whose conduct, by itself, was sufficient to cause the entire accident or was an essential factor in causing the accident.

We believe that victims' interests in full, fair recovery are best served by preservation of the common law doctrine of joint and several liability. Under state law, joint and several liability applies only when there is an indivisible harm resulting from the conduct of more than one party. A victim suffers indivisible harm when multiple parties—like airplane parts manufacturers, assembly personnel and pilots—engage in injurious conduct, yet the conduct of any one of the parties in itself could cause the entire injury, or the conduct of each party was an essential cause of the injury. Because responsibility for the kinds of injuries resulting from aviation accidents cannot be logically divided among the defendants, it is unfair to condition plaintiffs' recovery on proving the precise responsibility [1] of each defendant.

CONCLUSION

The General Aviation Accident Liability Standards Act would create reduced liability rules for manufacturers of general aviation aircraft. The proponents of the legislation have provided no demonstration that the existing state standards have been applied in an unreasonable manner. Nor have they shown that the proposed legislation would reduce insurance costs. In contrast, it is clear that the legislation would leave injured passengers without adequate compensation. Equally important, relaxing liability standards could only result in decreased incentives to design and manufacture safe aircraft.

Thank you for consideration.

Sincerely,

Linda A. Lipsen, Legislative Counsel, Consumers Union; Joseph Goffman, Staff Attorney, Public Citizen Congress Watch; Pamela Gilbert, Staff Attorney, U.S. PIRG; and Gene Kimmelman, Legilsative Director, Consumer Federation of America.

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[1] S. 2794 would only retain joint and several liability manufacturers under limited circumstances related to defective systems, components, subassemblies, etc. over which such manufacturers have substantial control.

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